

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment	)	WT Docket No. 17-79
by Removing Barriers to Infrastructure	)	
Investment	)	
	)	
Accelerating Wireline Broadband Deployment	)	WC Docket No. 17-84
by Removing Barriers to Infrastructure	)	
Investment	)	

**COMMENTS OF THE WIRELESS INFRASTRUCTURE ASSOCIATION**

D. Zachary Champ  
Director, Government Affairs

D. Van Fleet Bloys  
Senior Government Affairs Counsel

Sade Oshinubi  
Government Affairs Counsel

**Wireless Infrastructure Association**  
500 Montgomery Street, Suite 500  
Alexandria, VA 22314  
(703) 739-0300

June 15, 2017

## EXECUTIVE SUMMARY

The Wireless Infrastructure Association (“WIA”) recognizes and appreciates the Commission’s continuing commitment to create a regulatory environment that promotes wireless infrastructure deployment and the collocation of communications facilities on existing structures. Today, that commitment is more urgent than ever, as market developments converge to require densified networks able to keep up with demand and support new advanced wireless services. Our future includes the Internet of Things, and the Internet of Things requires a network of reality.

To achieve these networks, WIA is actively working at the federal, state, and local levels to remove deployment barriers, and applauds the positive efforts already undertaken in some states and communities. But consistent approaches are needed, or the innovation and competitiveness of the wireless industry will suffer. The record compiled in response to the *2016 Streamlining Public Notice* confirms that America’s wireless carriers and infrastructure providers continue to face significant delays and other barriers to deployment—including the deployment of small cells in rights-of-way (“ROW”) and collocations on existing macro sites. Regulatory reform is needed to clear these roadblocks and cut the red tape that unnecessarily increases costs and slows the rollout of wireless broadband services to consumers.

WIA thus supports forward thinking policies that encourage infrastructure investment while eliminating excessive reviews and burdensome and discriminatory requirements—policies Congress had in mind when it added Sections 253 and 332(c)(7) to the Communications Act. To clarify and bolster its previous orders interpreting these sections and other statutory mandates, and to facilitate the speedy deployment of needed wireless infrastructure, the Commission should take the following actions:

*First*, the Commission should reduce delays associated with the deployment of wireless facilities by implementing a deemed granted remedy for shot clock violations, and by adopting streamlined shot clocks as follows: a 60-day shot clock for all applications involving small wireless facilities located on an existing or replacement pole in a public ROW, applications for non-Spectrum Act facilities, applications involving like-for-like replacements of existing facilities, and applications for compound expansions; a 90-day shot clock for applications involving substantial modifications, including tower extensions; and a 120-day shot clock for applications for all other facilities, including new macro sites. In addition, the Commission should clarify that the shot clocks apply to all aspects of the wireless siting process, and that fee disputes, “batched” applications, and moratoria do not extend shot clock deadlines. And the Commission should declare that state and local regulations subjecting wireless deployments to longer or more onerous siting processes than non-wireless deployments violate Sections 253 and 332.

*Second*, the Commission should issue a declaratory ruling interpreting Sections 253 and 332(c)(7). In particular, the Commission should clarify that (i) Section 253 applies broadly to any “telecommunications service” (including wireless) and any “legal requirement” (including contracts); (ii) Section 253 bars regulations that materially inhibit or impede telecommunications, and local requirements need not be insurmountable to violate Section 253; (iii) the judicially-created substantial gap test under Section 332 is not workable in the context of small wireless facilities that add capacity; (iv) all fees charged by localities with regard to

wireless siting (*e.g.*, recurring, non-recurring, ROW access, municipal attachment, and application fees) must be nondiscriminatory and cost-based; (v) moratoria, requirements imposed on ROW applicants not related to ROW management, and other onerous conditions are prohibited; (vi) aesthetics should not play a role for wireless ROW deployments if not applicable to wireline, cable, and utility deployments; and (vii) management of and access to ROWs and associated poles implicate local authorities' regulatory authority and are subject to Sections 253 and 332.

*Third*, the Commission should continue to streamline and expedite environmental reviews. With respect to the National Environmental Policy Act ("NEPA"), the Commission should eliminate the need for most floodplain Environmental Assessments ("EAs"), expand the exclusion for small wireless support structures, and establish shot clocks to resolve environmental delays and disputes. It similarly should expand existing National Historic Preservation Act ("NHPA") exclusions for pole replacements, ROW facilities, collocations, small indoor deployments, small installations on traffic/light poles, and industrial park deployments. The Commission should also reform the Tribal review process and resolve the treatment of Twilight Towers, consistent with joint comments WIA has filed separately in WT Docket No. 17-79 with CTIA.

*Fourth*, the Commission should address pole attachment problems by adopting a 180-day shot clock to handle complaints. The Commission should also clarify that utility-owned light poles fall within the definition of "pole" as that term is used in Section 224 of the Act.

*Finally*, the Commission should continue to support efforts to remove barriers to wireless deployments on federal lands. While progress has been made, more work is needed to achieve streamlined access to federal lands for wireless infrastructure siting.

By taking these steps now, the Commission will help set a path for wireless infrastructure deployment that enables the U.S. to continue to be the global leader in mobile communications, including 5G.

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	1
INTRODUCTION .....	2
DISCUSSION .....	7
I. EVIDENCE BEFORE THE COMMISSION DEMONSTRATES THAT LOCAL REGULATIONS AND ACTIONS THWART DEPLOYMENT. ....	7
A. Municipal Delay Is Widespread and Significant. ....	7
B. Localities Continue to Impose Moratoria. ....	10
C. Requirements Imposed on Small Wireless ROW Deployments Are Discriminatory. ....	12
D. Unreasonable Conditions Often Are Imposed on Small Wireless ROW Deployments. ....	13
E. Fees Are Discriminatory, Excessive, and Exceed Costs.....	14
II. THE COMMISSION SHOULD TAKE ACTION TO REDUCE DELAYS ASSOCIATED WITH THE DEPLOYMENT OF WIRELESS FACILITIES. ....	15
A. The Commission Should Adopt a Deemed Granted Remedy for Shot Clock Violations. ....	15
B. The Commission Should Adopt a 60-Day Shot Clock for Applications Involving Small Wireless Facilities. ....	20
C. The Commission Should Shorten the Existing Shot Clocks for Certain Facilities. ....	22
D. The Commission Should Clarify the Scope of the Shot Clocks and Identify Actions that Do Not or Extend Their Operation. ....	24
E. The Timelines and Permitting Processes Applicable to Small Wireless ROW Installations Should Not Exceed the Utility Siting Process. ....	26
III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING INTERPETING SECTIONS 253 AND 332(C)(7).....	27
A. The FCC Has Authority Under Sections 253 and 332 to Issue a Declaratory Ruling.....	29
B. The Commission Should Clarify the Scope and Breadth of Sections 253 and 332.....	30
C. The Effective Prohibition Test Under Section 253 Is Different than the Judicially-Crafted Test Under Section 332(c)(7).....	32
D. The Commission Should Address Excessive ROW and Non-ROW Fees and Charges That Impede Wireless Deployments. ....	40
E. The Commission Should Define Other Actions That Effectively Prohibit or Discriminate Against Wireless Deployments.....	55

F.	The Commission Should Clarify That Access to Public Poles and ROWs Implicates Regulatory Functions Subject to Sections 253/332. ....	59
IV.	THE COMMISSION SHOULD CONTINUE TO EXPEDITE AND ELIMINATE UNNECESSARY ENVIRONMENTAL REVIEWS.....	62
A.	The Commission Should Further Streamline the NEPA Review Process.....	62
B.	The Commission Should Further Streamline the NHPA Review Process. ....	65
V.	THE COMMISSION SHOULD ADDRESS IMPEDIMENTS CREATED BY POLE ATTACHMENT PROBLEMS.....	73
VI.	THE COMMISSION SHOULD CONTINUE TO SUPPORT EFFORTS TO STREAMLINE WIRELESS FACILITY SITING ON FEDERAL LANDS. ....	74
	CONCLUSION.....	76

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment	)	WT Docket No. 17-79
by Removing Barriers to Infrastructure	)	
Investment	)	
	)	
Accelerating Wireline Broadband Deployment	)	WC Docket No. 17-84
by Removing Barriers to Infrastructure	)	
Investment	)	

**COMMENTS OF THE WIRELESS INFRASTRUCTURE ASSOCIATION**

The Wireless Infrastructure Association (“WIA”)<sup>1</sup> respectfully submits these comments in response to the *Notices of Proposed Rulemaking* and *Notices of Inquiry* issued in the captioned proceedings.<sup>2</sup> WIA supports the Commission’s efforts to remove regulatory barriers to wireless deployment. As the Commission correctly recognizes, the deployment of next-generation wireless broadband has the potential to deliver tremendous benefits that cannot be realized without “an updated regulatory framework that promotes and facilitates next generation network infrastructure facility deployment.”<sup>3</sup>

---

<sup>1</sup> WIA is the principal organization representing companies that build, design, own, and manage telecommunications facilities throughout the world. WIA’s over 230 members include telecommunications carriers, infrastructure providers, and professional services firms that own and operate towers, rooftop wireless sites, and other telecommunications facilities.

<sup>2</sup> Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, FCC 17-38 (rel. Apr. 21, 2017) (“Wireless NPRM” or “Wireless NOI”); Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Notice of Inquiry, and Request for Comment*, FCC 17-37 (rel. Apr. 21, 2017) (“Wireline NPRM” or “Wireline NOI”).

<sup>3</sup> *Wireless NPRM* ¶ 1.

## INTRODUCTION

America stands on the cusp of next generation 5G wireless networks that will deliver low-latency connections at extremely high speeds, enabling richer mobile healthcare, improved online education, enhanced public safety, even smarter cities, and an app economy that is the envy of the world.<sup>4</sup> To deliver these benefits, America’s wireless carriers and infrastructure providers must deploy new or upgrade existing wireless facilities, which requires removing obstacles to infrastructure investment.<sup>5</sup> Simply put, we must “break down barriers to broadband deployment.”<sup>6</sup>

Next generation networks are not merely a convenience; they are necessary to satisfy consumer demand for wireless data and video offerings. Last year mobile data traffic grew 44% in North America and a fivefold increase is expected between 2016 and 2021.<sup>7</sup> Indeed, mobile data traffic on smartphones alone is projected to increase from 5.1 Gigabytes per month in 2016 to 25 Gigabytes by 2022.<sup>8</sup> Additional demand for wireless services will come from the connection of vast quantities of digital devices—such as sensors, smart medical devices, home automation devices and appliances, wireless utility meters, connected cars, and consumer

---

<sup>4</sup> See Jonathan Adelstein, President and CEO, Wireless Infrastructure Association, Opening Remarks at the Wireless Infrastructure Show (May 23, 2017).

<sup>5</sup> *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12866-67 ¶ 3 (2014) (“2014 Wireless Infrastructure Order”), *aff’d*, *Montgomery County v. F.C.C.*, 811 F.3d 121 (4th Cir. 2015); News Release, FCC, *FCC Chairman Ajit Pai Announces Broadband Deployment Advisory Committee Members, Working Groups, and Leadership* (rel. Apr. 6, 2017) (“Pai BDAC News Release”).

<sup>6</sup> Pai BDAC News Release at 1.

<sup>7</sup> Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016–2021*, at 4, 33 (Feb. 7, 2017).

<sup>8</sup> ERICSSON, ERICSSON MOBILITY REPORT 12-13 (Nov. 2016).

electronics—wirelessly to the Internet.<sup>9</sup> According to one research firm, this “Internet of Things” (“IoT”) is expected to reach 20.4 billion devices by 2020.<sup>10</sup>

This growth in mobile data usage and connected devices is imposing unprecedented capacity demands on wireless networks. These demands can be met through more spectrum, increased technological efficiency, and more wireless infrastructure (i.e., densification). All three are essential—but wireless infrastructure immediately addresses the wireless data crunch. And even with more spectrum or technological advancements, carriers need more infrastructure to deliver more bandwidth. As the chart below shows, spectrum re-use enabled by network densification (i.e., new infrastructure) has increased wireless capacity by a factor of 1600 over the past forty-five years—more than sixty-four times greater than either new spectrum availability or the deployment of new modulation technologies.<sup>11</sup>

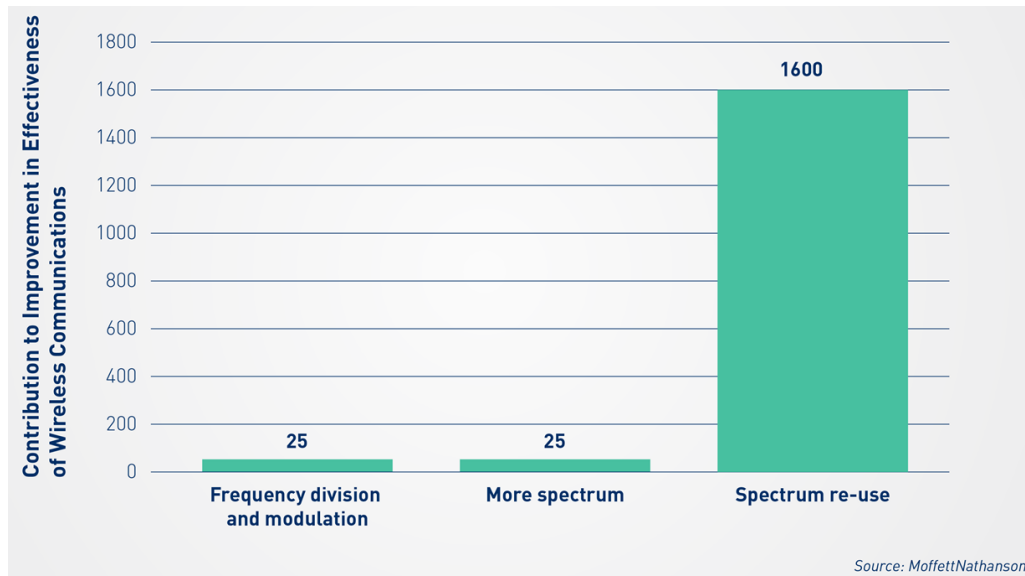
---

<sup>9</sup> See Joint Venture Silicon Valley, *Bridging the Gap: 21st Century Wireless Telecommunications Handbook* 8 (Sept. 2016).

<sup>10</sup> New Release, Gartner, Inc., *Gartner Says 8.4 Billion Connected “Things” Will Be in Use in 2017, Up 31 Percent From 2016* (Feb. 7, 2017).

<sup>11</sup> *Spectrum (Part 1): Meeting the Capacity Challenge* at 6 (MoffettNathanson Research, Mar. 22, 2017).





In other words, wireless carriers cannot meet consumer demand for wireless services without the rapid deployment of wireless infrastructure—the “physical foundation that supports all wireless communications.”<sup>12</sup> To meet this need, providers are densifying their networks by deploying small wireless facilities, including Distributed Antenna Systems (“DAS”) and small cells.<sup>13</sup> According to one estimate, up to 150,000 small cells will be constructed by the end of 2018, and that number will rise to nearly 800,000 by 2026.<sup>14</sup> Wireless operators are expected to invest \$275 billion dollars in wireless networks over the next decade to accommodate this demand.<sup>15</sup>

<sup>12</sup> 2014 Wireless Infrastructure Order, 29 FCC Rcd at 12866 ¶ 1.

<sup>13</sup> See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Public Notice, 31 FCC Rcd 13360, 13363 (WTB 2016) (“2016 Streamlining Public Notice”).

<sup>14</sup> John Fletcher, *Small Cell and Tower Projections through 2026*, SNL Kagan Wireless Investor (Sept. 27, 2016); 2016 Streamlining Public Notice, 31 FCC Rcd at 13363-64.

<sup>15</sup> See Accenture Strategy, *How 5G Can Help Municipalities Become Vibrant Smart Cities*, at 1 (Jan. 12, 2017).

But to carry out these massive infrastructure investments, America’s wireless carriers and infrastructure providers must overcome significant obstacles that continue to delay or thwart the deployment of wireless facilities—including the deployment of small wireless facilities in public rights-of-way (“ROWS”) that, along with the backbone of existing macro sites and fiber, will play an important role in the rollout of 5G.<sup>16</sup> These obstacles include significant delays, unclear and inconsistently applied local processes, burdensome requirements and limitations, moratoria, and arbitrary and exorbitant fees when attempting to site wireless facilities, among others.

Regulatory reform is needed to clear these roadblocks that increase costs and slow the rollout of wireless broadband services to consumers. WIA thus supports forward-thinking policies that encourage infrastructure investment while eliminating excessive reviews and burdensome and discriminatory regulations and policies that delay or deter deployment. As Chairman Pai has explained: “[T]he simple truth is that governments at all levels often make the task harder than it needs to be. Permitting processes can drag on, access to rights-of-way can be

---

<sup>16</sup> Unless otherwise stated, the term “small wireless facility” includes both individual nodes in a DAS network, as well as stand-alone installations that are not part of a DAS network. In terms of size, a small wireless facility refers to equipment meeting the volumetric definition contained in the First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2016), codified as 47 C.F.R. Pt. 1, App. B (“Collocation Agreement”), as well as legislation recently passed in Ohio (SB 331) and Virginia (SB 1282). Together, they define a small wireless facility as a facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services. In addition, the term small wireless facility will mean an installation on a pole or other support structure (including a replacement pole) in the ROW that is no greater than 50 feet above ground level or ten feet in height above the tallest existing utility pole within 500 feet of the installation in the same ROW, whichever is greater. These height limitations are drawn from those adopted in Ohio SB 331.

delayed, review processes designed for larger macro sites can be applied to small cell deployments, and exorbitant fees can be imposed.”<sup>17</sup>

WIA is actively working at the federal, state, and local levels to remove barriers to infrastructure deployment, including through representation on the recently established Broadband Development Advisory Committee (“BDAC”). While WIA applauds the positive efforts already undertaken in some states and communities, consistent approaches are needed or the innovation and competitiveness of the wireless industry will suffer. These dual proceedings, along with the *2016 Streamlining Public Notice* and the BDAC’s efforts, provide the perfect opportunities to address wireless deployment obstacles.<sup>18</sup> The Commission should take action without delay in these proceedings to clarify and bolster its previous orders interpreting Sections 253 and 332(c)(7) of the Communications Act (the “Act”), and to guide local governments to act

---

<sup>17</sup> Ajit Pai, Commissioner, FCC, Remarks at the CTIA Wireless Foundation Smart Cities Expo, Washington, DC, at 1 (Nov. 2, 2016) (“Pai Digital Empowerment Remarks”). Commissioner O’Rielly has likewise noted that “[s]tanding in the way of progress . . . are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule,” and has called on the Commission to “provide greater assistance [in] removing barriers to the wireless infrastructure necessary to deploy 5G.” Michael O’Rielly, Commissioner, FCC Statement Before the Senate Committee on Commerce, Science, and Transportation “Oversight of the Federal Communications Commission, at 1-2 (Sept. 15, 2016). And Commissioner Clyburn has stressed the need to streamline the deployment process to help make communities more connected, explaining “We must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace.” Mignon L. Clyburn, Commissioner, FCC, Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 4 (Oct. 19, 2016) (“Clyburn Remarks”).

<sup>18</sup> Given the applicability of various issues raised in the wireline item to the wireless industry, WIA is submitting a single set of comments addressing all barriers to wireless broadband deployment in both dockets. For the Commission’s convenience, WIA is attaching its comments and reply comments submitted in WT Docket 16-421, which are hereby incorporated by reference. Unless otherwise indicated, all citations to comments herein refer to comments submitted in response to the *2016 Streamlining Public Notice*, WT Docket 16-421.

in a competitively neutral and nondiscriminatory manner consistent with the Telecommunications Act of 1996 (“1996 Act”).<sup>19</sup>

By taking the steps identified below, the FCC will lay the groundwork to help ensure the U.S. continues to be the global leader in mobile communications, supported by world class networks that deliver a growing mobile economy today and for generations to come.

## **DISCUSSION**

### **I. EVIDENCE BEFORE THE COMMISSION DEMONSTRATES THAT LOCAL REGULATIONS AND ACTIONS THWART DEPLOYMENT.**

While the Commission has made important strides toward lowering barriers to wireless infrastructure deployment, WIA members report that they are facing more local delay and burdensome regulation than ever before. The record in response to the *2016 Streamlining Public Notice*<sup>20</sup> confirms the experience of WIA’s members: companies seeking to deploy wireless facilities face significant obstacles that effectively thwart the deployment of wireless facilities, including small wireless facilities in public ROWs that are critical to support 5G.

#### **A. Municipal Delay Is Widespread and Significant.**

WIA’s members continue to report that significant municipal delay is a primary barrier to deployment that effectively prohibits the provision of telecommunications service via small wireless facilities. One member reports that 70% of its applications to deploy small wireless facilities in the public ROWs during a two-year period exceeded the 90-day shot clock for installation of small wireless facilities on an existing utility pole, and 47% exceeded the 150-day shot clock for the construction of new towers.<sup>21</sup> Another member reports that the wireless siting

---

<sup>19</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>20</sup> *2016 Streamlining Public Notice*, 31 FCC Rcd 13360.

<sup>21</sup> *See, e.g., 2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12973-74 ¶¶ 270-272.

approval process exceeds 90 days in more than 33% of jurisdictions it surveyed, and exceeds 150 days in 25% of surveyed jurisdictions.

These member experiences are not unique, and reflect only the amount of time to gain *approval* of applications. The metrics do not include all of the applications that have been pending with local governments for months and even years, with no time certain for gaining approval. Indeed, one member reports an application that has been pending with a New Jersey township for nearly a year, and applications pending in municipalities in New Hampshire and Maine for more than two years. Another member reports applications in five different jurisdictions that have been pending for nearly *three years*. It is common for members to have multiple jurisdictions where application processing delays have reached two years or more.

The record in response to the *2016 Streamlining Public Notice* further confirms that the wireless siting approval process injects significant and unnecessary delay into the infrastructure deployment process. For example:

- Crown Castle described how many cities are causing delay by requiring lengthy “pre-application” processes in which municipal staff gives feedback requiring changes that create a cycle of delay.<sup>22</sup> Indeed, in *Crown Castle NG East, Inc. v. Town of Greenburgh*, the town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even “deem complete” Crown Castle’s application.<sup>23</sup>
- ExteNet provided the Commission with specific data revealing that 47% of its applications had taken longer than even the longest reasonable shot clock applicable to

---

<sup>22</sup> Comments of Crown Castle International Corp., at 21-22 (filed Mar. 8, 2017) (“Crown Castle Comments”).

<sup>23</sup> *Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699 (S.D.N.Y. July 3, 2013), *aff’d*, 552 F. App’x 47 (2d Cir. 2014).

installation of small wireless facilities on existing utility poles.<sup>24</sup> It also included an example of a two-year-long ordeal where the city repeatedly changed the requirements.<sup>25</sup>

- Lighttower disclosed that forty-six separate jurisdictions in the last two years had taken longer than 150 days to consider applications, with twelve of those jurisdictions—representing 101 small wireless facilities—taking more than a year.<sup>26</sup>
- T-Mobile reported that “roughly thirty percent of all recently proposed T-Mobile sites (including small cells) involve cases where the locality simply fails to act, in violation of the shot clocks.”<sup>27</sup> It also noted that cities sometimes refuse to consider siting applications until a Master License Agreement for ROW access has been negotiated, but merely negotiating the agreement takes longer than six months.<sup>28</sup>
- AT&T likewise identified numerous local siting delays, including one locality in California where the application process took over 800 days.<sup>29</sup>
- Verizon provided a six-page Appendix listing numerous delays.<sup>30</sup>

Delays in processing are not due to a lack of staff or ROW management issues. Local government delays frequently are driven by excessive regulation, a lack of clarity, or inconsistent application of regulations. Companies deploying small wireless facilities report multi-year delays driven by cities micromanaging every element of the technology and deployment. Companies also experience delay where local governments constantly change their demands and requirements—even after providers have worked with the local government over extended periods to develop a deployment that meets the local government’s desires. For example, in one

---

<sup>24</sup> Comments of ExteNet Systems, Inc., at 5 (filed Mar. 8, 2017) (“ExteNet Comments”). As ExteNet explained, under the *2014 Infrastructure Order*, the longer 150-day shot clock is applicable to small wireless facility deployments involving installation of *new* poles, whereas attachments to existing utilities poles should be subject to the 90-day shot clock. *Id.* at 5-6.

<sup>25</sup> *Id.* at 11-15.

<sup>26</sup> Comments of Lighttower Fiber Networks, at 4 (filed Mar. 8, 2017) (“Lighttower Comments”).

<sup>27</sup> Comments of T-Mobile USA, Inc., at 8 (filed Mar. 8, 2017) (“T-Mobile Comments”).

<sup>28</sup> *Id.* at 6.

<sup>29</sup> Comments of AT&T, at 23 (filed Mar. 8, 2017) (“AT&T Comments”).

<sup>30</sup> Comments of Verizon, at App. A (filed Mar. 8, 2017) (“Verizon Comments”).

California city, staff insisted on “scrutiniz[ing] the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses, stealthing, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance.”<sup>31</sup> Members report that similar experiences are commonplace throughout California and other jurisdictions across the country.

### **B. Localities Continue to Impose Moratoria.**

Many localities continue to adopt moratoria and rely on them as a basis for refusing to act on wireless siting applications. The record in response to the *2016 Streamlining Public Notice* demonstrates that moratoria on the deployment of small wireless facilities are rampant and only becoming more prevalent, as indicated by the selected examples below:

- Many localities and State DOTs have implemented moratoria governing ROW access.<sup>32</sup>
- Localities in California, Iowa, and Minnesota issued indefinite moratoria in August 2016 prohibiting new wireless and/or small cell facilities.<sup>33</sup>

---

<sup>31</sup> AT&T Comments at 23.

<sup>32</sup> Comments of WIA, at 16-17 (filed Mar. 8, 2017) (“WIA Comments”); AT&T Comments at 7-8; Crown Castle Comments at 15-16; Comments of Mobilitie, LLC, at 10-11 (filed Mar. 8, 2017) (“Mobilitie Comments”); *see, e.g.*, Marc Benjamin, *Fresno County to cellphone tower companies: Stay off our land, at least for now*, THE FRESNO BEE (Nov. 20, 2016), <http://www.fresnobee.com/news/local/article116012318.html>; Noel Brinkerhoff, *American Canyon halts effort to add wireless antennas to streetlights*, THE AMERICAN CANYON EAGLE (Aug. 31, 2016), [http://napavalleyregister.com/eagle/news/local/american-canyon-halts-effort-to-add-wireless-antennas-to-streetlights/article\\_1258e1e4-a625-5b48-b6b8-a848b57e5b11.html](http://napavalleyregister.com/eagle/news/local/american-canyon-halts-effort-to-add-wireless-antennas-to-streetlights/article_1258e1e4-a625-5b48-b6b8-a848b57e5b11.html); Alexandra Seltzer, *City issues moratorium on new cell towers*, MyPALMBEACHPOST, (Nov. 21, 2016), <http://www.mypalmbeachpost.com/news/local/city-issues-moratorium-new-cell-towers/bQCOw0PXcaPQrUo2SlxvUN>.

<sup>33</sup> Mobilitie Comments at 11.

- Multiple jurisdictions in New York, Ohio, and Texas also have imposed wireless siting moratoria.<sup>34</sup> These include the towns of Tonawanda, NY and Amherst, NY, which recently adopted moratoria applicable to processing and approving small cell applications.

*De facto* moratoria have also been imposed across multiple jurisdictions in Massachusetts and Illinois. These jurisdictions have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered.<sup>35</sup> These *de facto* moratoria have resulted in delays ranging from 2.5 to 10 months or, in some cases, indefinite delays. In Myrtle Beach, South Carolina, the City has refused to process requests to deploy small cell facilities in ROWs. DeKalb County, Georgia similarly has refused to issue permits for small cells for the past year. One WIA member is currently prohibited from deploying approximately eighty-five small wireless facilities in nine jurisdictions that have either enacted a moratorium or entered an indefinite holding pattern constituting a *de facto* moratorium. These types of obstacles have also added between one to three years of delay to the member's deployment efforts.

Moratoria often are targeted responses, put in place after applications are submitted, to indefinitely defer consideration of new wireless siting proposals. Even in jurisdictions where

---

<sup>34</sup> See Comments of Competitive Carriers Association, at 31-33 (filed Mar. 8, 2017) ("CCA Comments"); Nancy A. Fisher, *Tonawanda puts a moratorium on cell towers*, THE BUFFALO NEWS (Mar. 28, 2017), <http://buffalonews.com/2017/03/28/tonawanda-puts-moratorium-cell-towers/>; Town of Amherst Erie County, New York, Town Board Resolution 2017-511, *Wireless Communications Moratorium* (May 8, 2017), [http://amherstny.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=&MeetingID=2824&MediaPosition=&ID=16925&CssClass](http://amherstny.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=2824&MediaPosition=&ID=16925&CssClass).

<sup>35</sup> The WIA member seeking to deploy in these jurisdictions has been working cooperatively with the local government officials (and, in some cases, the consultants they have hired) as they formulate their small wireless facility permitting policies.



state legislation has been enacted to streamline the process and limit local government authority over small wireless facilities, some local governments have responded by enacting moratoria while they “study the effect” of such legislation on their authority.<sup>36</sup>

**C. Requirements Imposed on Small Wireless ROW Deployments Are Discriminatory.**

Local governments also discriminate against wireless carriers seeking to deploy small wireless facilities in ROWs, by applying different permitting requirements than those imposed on other telecommunications carriers and utilities seeking to deploy similarly-sized equipment. Cities around the country generally have regulations establishing permitting processes pursuant to which telecommunications and utility facilities are installed on poles. Those processes typically involve a ministerial review process pursuant to which applications are reviewed and permits issued in a matter of days, or at most a few weeks. In some communities, non-CMRS telecommunications carriers and utility companies are not required to obtain *any* site-specific permits before installing equipment on existing utility poles. Yet, for small wireless facility installations on such poles, many cities are refusing to process the deployments under the traditional ROW permit process. Or the cities impose additional requirements or restrictions on small wireless facilities that are not imposed on other ROW users.

For example, San Francisco requires numerous additional steps of proposed small wireless facility applicants in ROWs even though other ROW deployments are not subject to a

---

<sup>36</sup> See, e.g., Jaime Anton, *City extends antenna moratorium*, THE ROYALTON POST (Feb. 11, 2017), [http://www.thepostnewspapers.com/north\\_royalton/local\\_news/city-extends-antenna-moratorium/article\\_838b18bd-1cbb-5ddc-9620-9a37cc81ebc3.html](http://www.thepostnewspapers.com/north_royalton/local_news/city-extends-antenna-moratorium/article_838b18bd-1cbb-5ddc-9620-9a37cc81ebc3.html).

similar review process.<sup>37</sup> According to T-Mobile, “[e]ighty percent of jurisdictions in T-Mobile’s experience treat DAS and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities.”<sup>38</sup> Indeed, in extreme examples, cities are mandating that small wireless facility installations comply with requirements that are not even consistent with the city’s code. For example, one jurisdiction in a western suburb of Chicago requires that a full special use permit package be submitted with each small wireless facility application, even if the location of the proposed deployment is not in a zone or district that requires a special use permit under the local code.

**D. Unreasonable Conditions Often Are Imposed on Small Wireless ROW Deployments.**

WIA members report that some cities use access to ROWs as a bargaining chip for various unreasonable demands, such as free telecommunications service or “charitable donations” (where charging fees for use of the ROW are specifically prohibited by law), or to gain leverage in unrelated matters. Other examples of unreasonable conditions include:

- One Massachusetts jurisdiction refused to take action on a member’s six permit applications pending for nearly a year unless and until an affiliate of the member cooperates with other municipal initiatives.
- A city in Maryland refused to allow one WIA member access to its pole infrastructure in the ROW unless the member agreed to two separate agreements, each with its own fees, conditions, and demands (such as placing additional conduit for the city’s exclusive use, special permitting fees, the requirement for public hearings, and monthly recurring charges escalating at 4% per year).
- Atlanta, Georgia is requiring applicants seeking to deploy poles in ROWs to bear all costs associated with the deployments, and then transfer ownership of the new poles to the City.

---

<sup>37</sup> See Crown Castle Comments at 15 (citing pre-deployment aesthetic review requirements); *accord* Lightower Comments at 8 (noting zoning requirements that are triggered for wireless antenna deployments that do not apply to fiber deployments).

<sup>38</sup> T-Mobile Comments at 7.

- Washington, DC is demanding that one WIA member, as a condition of ROW access, install city-owned Wi-Fi equipment, and then run fiber to that equipment at every location where the member would be installing small cells.<sup>39</sup>

#### **E. Fees Are Discriminatory, Excessive, and Exceed Costs.**

Local governments also discriminate against new technology deployment by imposing fees on small wireless facility deployments that are not imposed on (or are radically higher than those charged to) other telecommunications or utility facilities in public ROWs. This is the case even though wireless infrastructure deployed in ROWs is nearly identical to “non-wireless” infrastructure used by other communications or utility companies.<sup>40</sup> In many cases, small wireless facilities use the exact same equipment cabinet as non-wireless providers and, in some cases, the small wireless facility equipment is smaller than equipment installed by other communications or utility ROW pole occupants.

For example, one city in the suburbs of Seattle requires a \$5,000 fee before it will begin review of the required ROW agreement. Similarly, a Virginia city seeks a one-time fee of \$5,000 to evaluate ROW permits for small wireless facility attachments to existing structures. These fees historically were not assessed against utilities or other telecommunications providers.

In addition to one-time fees, localities often charge excessive recurring charges for small wireless facility installations in ROWs. For example, one Massachusetts city seeks an annual \$6,000 per pole fee for the right to use the public ROW. This would trigger a \$300,000 annual fee merely to maintain fifty small wireless facilities in the ROW. Similarly, a northeast state Department of Transportation (“DOT”) imposes an annual \$37,000 *per node* fee, a fee that is not applied to “public utilities” (including wireline telecommunications providers). Another east

---

<sup>39</sup> Other unreasonable demands and limitations reported by WIA members include a cash escrow for the life of an installation and annual landscaping fees.

<sup>40</sup> See *infra* Section III.D.1.

coast DOT takes a similar approach by charging the same annual fee—\$24,000—regardless of whether the proposal involves a very tall new tower or a small wireless facility attachment to an existing utility pole. Moreover, this DOT does not levy the same fee on the electric company for utility pole installations.

WIA members have reported other wide-ranging municipal fee demands for use of the public ROWs—anywhere from percentages of gross revenues (as high as 5.4%), to linear foot charges of more than six dollars per foot, to \$10,000 in up-front “deposits” for application review. WIA understands that such fees, which generally have no relation to ROW management costs, are not imposed on other utilities.

## **II. THE COMMISSION SHOULD TAKE ACTION TO REDUCE DELAYS ASSOCIATED WITH THE DEPLOYMENT OF WIRELESS FACILITIES.**

The Commission should act now to address delays slowing the deployment of wireless facilities, including small wireless facilities in ROWs, by (i) adopting a deemed granted remedy for shot clock violations; (ii) adopting a 60-day shot clock for all applications involving small wireless facilities located on an existing or replacement pole in a public ROW; (iii) shortening existing shot clocks for certain facilities; (iv) clarifying that “batched” applications do not extend shot clock deadlines; and (v) declaring that State and local regulations subjecting wireless deployments to longer or more onerous siting processes than non-wireless deployments violate Sections 253 and 332.

### **A. The Commission Should Adopt a Deemed Granted Remedy for Shot Clock Violations.**

The Commission should adopt a “deemed granted” remedy for jurisdictions that fail to satisfy their obligations under Section 332(c)(7)(B)(ii) to timely act on applications.<sup>41</sup> The record

---

<sup>41</sup> *Wireless NPRM* ¶¶ 8-9.

in response to the *2016 Streamlining Public Notice* includes widespread support for adoption of such a remedy.<sup>42</sup> The fact that some jurisdictions have already adopted a deemed granted remedy demonstrates that such an approach is not unduly burdensome.<sup>43</sup>

Absent a deemed granted remedy, there may be no meaningful relief for a local government's failure to act on a wireless siting application within a reasonable period of time. Indeed, one WIA member reports that if it challenged every shot clock violation, it would be engaged in lawsuits with forty-six different communities. The record compiled in response to the *2016 Streamlining Public Notice* further demonstrates that filing a lawsuit is time consuming and is not a realistic option. As Lighttower explained, "[h]aving to bring suit in every such case [of a shot clock violation] would, in and of itself, effectively prohibit Lighttower from providing telecommunications service."<sup>44</sup> Other parties also explained how the lack of a meaningful remedy for municipal delay was prohibiting the provision of telecommunications services and that the Commission should adopt more meaningful remedies.<sup>45</sup> WIA supports all of those comments.

Adoption of a deemed granted remedy also is needed because various courts faced with shot clock claims have failed to provide a meaningful remedy. For example, despite finding that

---

<sup>42</sup> See, e.g., AT&T Comments at 5; CCA Comments at 13-14; Crown Castle Comments at 33-36; Comments of CTIA, at 39-43 (filed Mar. 8, 2017) ("CTIA Comments"); Comments of Sprint Corporation, at 41-42 (filed Mar. 8, 2017) ("Sprint Comments"); T-Mobile Comments at 25; Verizon Comments at 23-26; WIA Comments at 3-4.

<sup>43</sup> See, e.g., Comments of Kenton County Mayors Group, at 1 (filed Mar. 3, 2017); Lighttower Comments at 13; Comments of the City and County of San Francisco, at 26 (filed Mar. 8, 2017); see also Cal. Gov. Code § 65964.1.

<sup>44</sup> Lighttower Comments at 5.

<sup>45</sup> See, e.g., WIA Comments at 3-4; AT&T Comments at 25-26; Crown Castle Comments at 33-36; CTIA Comments at 18, 39-40; T-Mobile Comments at 25-26.

a town had failed to act on a wireless siting application in a reasonable period of time in violation of Section 332(c)(7)(B)(ii), the court in *Up State Tower Co. v. Town of Kiantone* refused to issue an order requiring the Town to grant the application.<sup>46</sup> Instead, the court gave the town an additional twenty days to issue a decision on the application—not to grant the application, but simply to act.<sup>47</sup> As a result, eighteen months after an application was filed, the court’s “remedy” for the failure to act in a timely manner was to give the town *more time* to act.

WIA thus supports the three-pronged approach proposed by the Commission—establishing an irrebuttable presumption on the reasonable time for action on wireless applications, finding that state and local authority lapses if they fail to act within a reasonable period of time, and/or promulgating a “deemed granted” rule pursuant to Section 332(c)(7), standing alone or in conjunction with Section 253 or other provisions of the Act.<sup>48</sup> The Commission has ample legal authority to adopt these approaches.<sup>49</sup>

First, a deemed granted remedy is consistent with the text of Section 332(c)(7)(B)(v), which provides that a person “adversely affected by any final action or failure to act by a State or local government *may* . . . commence an action in any court of competent jurisdiction.” The permissive nature of the statute leaves room for the Commission to fashion other remedies. To the extent the permissive nature of the statute is ambiguous on its face, the Commission has broad authority to render definitive interpretations of ambiguous provisions.<sup>50</sup> Indeed, even

---

<sup>46</sup> *Up State Tower Co. v. Town of Kiantone*, 2016 U.S. Dist. LEXIS 170827 (W.D.N.Y. Dec. 9, 2016).

<sup>47</sup> *Id.* \*20.

<sup>48</sup> *See Wireless NPRM* ¶¶ 9-16.

<sup>49</sup> *See id.* ¶¶ 11-16.

<sup>50</sup> *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All*

where Congress explicitly provides for a judicial remedy in a federal or state court, the Commission has the authority to issue interpretive rulings of the provisions of the Communications Act and its amendments (including the 1996 Act).<sup>51</sup>

Second, Sections 201(b) and 303(r) provide authority to adopt a deemed granted remedy.<sup>52</sup> These sections “generally authorize the Commission to adopt rules or issue other orders to carry out the substantive provisions of the Communications Act.”<sup>53</sup> As the Supreme Court has recognized, “§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.”<sup>54</sup> Section 303(r) in turn supplements the Commission’s authority to carry out the mandates of the Communications Act.<sup>55</sup>

Third, Section 253(a) provides additional authority to adopt a deemed granted remedy.<sup>56</sup> As the Commission correctly theorizes, Section 253(a) authorizes the adoption of rules

---

*Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd 13994, 14020 ¶ 67 (2009) (“*Shot Clock Declaratory Ruling*”), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

<sup>51</sup> See, e.g., *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 775 (6th Cir. 2008) (citing *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999) (“assignment[]” of the adjudicatory task to state commissions did not “logically preclude the [FCC]’s issuance of rules” to guide the state-commission judgments); *City of Arlington*, 668 F.3d at 254.

<sup>52</sup> See 47 U.S.C. §§ 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act].”), 303(r) (directing the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]”), 253(c).

<sup>53</sup> *Wireless NPRM* ¶ 15 (citation omitted).

<sup>54</sup> *Iowa Utils. Bd.*, 525 U.S. at 380; see *City of Arlington*, 133 S. Ct. at 1866 (stating, in the context of Section 332(c)(7), that “Section 201(b) . . . empowers the . . . Commission to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions.’ Of course, that rulemaking authority extends to the subsequently added portions of the Act.”) (quoting § 201(b) and citing *Brand X*).

<sup>55</sup> See, e.g., *Cellco P’ship v. FCC*, 700 F.3d 534, 543 (2012).

<sup>56</sup> See *Wireless NPRM* ¶ 15 n.30.

preempting regulations that have the “effect of prohibiting” wireless carriers’ provision of service.<sup>57</sup> The failure to act on a wireless siting application within a reasonable period of time certainly has the effect of prohibiting the provision of wireless service, which therefore justifies adoption of a rule implementing a deemed granted remedy.

Fourth, the Commission has already adopted a deemed granted remedy in a related context—when local authorities unreasonably refuse to grant a competitive cable television franchise pursuant to Section 621 of the Act within a specified period—and the Sixth Circuit upheld the Commission’s authority to impose that deemed granted remedy.<sup>58</sup> Similar to Section 332, Section 621(a)(1) provides that an aggrieved applicant “may” appeal,<sup>59</sup> but the FCC still adopted a deemed granted remedy.<sup>60</sup> The petitioners seeking to overturn the Commission’s order argued that because Congress specifically provided for a judicial remedy under Section 621 and did not otherwise expressly reference the agency, the Commission lacked authority to adopt a deemed granted remedy.<sup>61</sup> The Sixth Circuit disagreed, and held that “the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of Section

---

<sup>57</sup> 47 U.S.C. § 253(a).

<sup>58</sup> *See Alliance for Cmty. Media*, 529 F.3d at 775.

<sup>59</sup> 47 U.S.C. § 541(a)(1).

<sup>60</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 ¶ 4, 5127-28 ¶ 54, 5132 ¶ 62, 5134-37 ¶¶ 68-73, 5139-40 ¶¶ 77-78 (2007) (“*Cable Policy Act*”), *pet. for rev. denied sub nom. Alliance for Cmty. Media*, 529 F.3d 763, *cert. denied*, 557 U.S. 904 (2009); *see also Cable Policy Act*, 22 FCC Rcd at 5140 ¶ 80 (noting that “the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker”) (citing examples). Specifically, if a local cable franchising authority has not made a final decision on a franchise application within a specified period, the authority is deemed to have granted the applicant an interim franchise until it delivers a final decision.

<sup>61</sup> *Alliance for Cmty. Media*, at 773.



621(a)(1)” and “the statutory silence in Section 621(a)(1) regarding the agency’s rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision.”<sup>62</sup>

Finally, the adoption of a deemed granted remedy does not obviate the judicial remedy that exists in Section 332(c)(7)(B)(v), which will continue to provide a vehicle for resolving specific local siting disputes and allow localities to challenge a deemed grant. In that regard, the Commission should adopt the same procedures it adopted for the deemed granted remedy implementing Section 6409(a) of the Spectrum Act,<sup>63</sup> namely:

- If an application is not acted upon within the applicable shot clock, it is deemed granted;
- The deemed granted remedy becomes effective once the applicant notifies the relevant authority via a letter that the period for review has expired and the application is therefore deemed granted;
- Upon receipt of the letter, the authority may challenge the deemed granted determination in any court of competent jurisdiction; and
- If an applicant whose application has been deemed granted seeks some form of judicial imprimatur for the grant, it may file with a court of competent jurisdiction a request for declaratory judgment or other relief that a court may find appropriate.<sup>64</sup>

**B. The Commission Should Adopt a 60-Day Shot Clock for Applications Involving Small Wireless Facilities.**

The Commission should adopt a 60-day shot clock for all applications involving small wireless facilities located on an existing or replacement pole in a public ROW.<sup>65</sup> As discussed,

---

<sup>62</sup> *Id.* at 774.

<sup>63</sup> See Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), Pub. L. No. 112-96, 126 Stat. 156, 232-33 § 6409(a) (2012) (“Spectrum Act”) (codified at 47 U.S.C. § 1455(a)).

<sup>64</sup> See 2014 *Wireless Infrastructure Order*, 29 FCC Rcd at 12957 ¶ 216, 12961 ¶ 226, 12962 ¶ 231, 12963 ¶ 236.

<sup>65</sup> See *supra* note 16 (defining size limits for small wireless facilities, including support poles); see also *Wireless NPRM* ¶¶ 18-19 (seeking comment on whether to adopt shorter shot clocks to accelerate wireless infrastructure deployment).

the size and appearance of small wireless facility equipment generally is no different (and sometimes smaller) than the wireline, cable, or utility equipment already deployed on utility poles throughout public ROWs. Given these similarities, there is no basis for local authorities to process non-wireless permitting applications “over the counter” in a matter of days, yet subject small wireless facility deployments to a much more lengthy and burdensome process.

Declaring that 60 days is the maximum reasonable time period for a local government to act on a small wireless facility application is consistent with the Commission’s holding in its *2014 Wireless Infrastructure Order*, which adopted a 60-day shot clock for certain collocations on a tower or structure with an existing antenna. Although a new small wireless facility installation on an existing utility pole may not qualify as an “eligible facility request” if there is no previous wireless attachment, it is fundamentally similar to a collocation under Section 6409(a). In both cases, the largest intrusion into the ROW is the utility pole, which is already in place and has already been approved for telecommunications and utility attachments. There is nothing about the small wireless facility attachment that warrants special treatment—except the emission of radio frequencies, and Congress has clearly prohibited jurisdictions from regulating based on concerns about radio frequencies.<sup>66</sup>

Indeed, in the *2014 Wireless Infrastructure Order*, the Commission repeatedly recognized that small wireless facilities can be installed “with little or no impact.”<sup>67</sup> As the Commission correctly concluded, small wireless facility deployments are a “fraction of the size” of traditional macro sites and are “far less obtrusive.”<sup>68</sup> The reduced profile, less obtrusiveness,

---

<sup>66</sup> 47 U.S.C. § 332(c)(7)(B)(iv).

<sup>67</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12866-67 ¶ 3.

<sup>68</sup> *Id.*

and shorter height of these smaller facilities should not trigger a lengthy permitting review process.

**C. The Commission Should Shorten the Existing Shot Clocks for Certain Facilities.**

Consistent with its proposal in the NPRM, the FCC should harmonize the applicable time frames for non-Spectrum Act collocations from 90 days to 60 days.<sup>69</sup> Shortening the applicable time frame for a broader range of collocations on existing structures will encourage those types of deployments and help realize the benefits of the neutral-host infrastructure model. Reducing the need for new support structures has aesthetic and efficiency advantages; as such, collocation facilitates competitive market entrants and is preferred by historic and environmental preservation interests and local jurisdictions. Accordingly, the FCC should promote efficient collocation of sites on existing structures by harmonizing these shot clock timeframes.

The Commission should also include replacement of the existing underlying structure with a like structure in the expedited 60-day shot clock. Colloquially called a “drop-and-swap,” replacing a like structure with a like structure (for example, monopole for monopole) should be deemed an “eligible facilities request” under Section 6409(a) so long as the new structure does not represent a substantial change in the physical dimensions of the replaced structure.<sup>70</sup> These support structure replacements are minimally impactful, remain consistent with the original zoning approval, and allow for economically and environmentally efficient use of existing wireless facility sites.<sup>71</sup>

---

<sup>69</sup> *Wireless NPRM* ¶ 18.

<sup>70</sup> See Comments of PCIA – The Wireless Infrastructure Association & the HetNet Forum, WT Docket No. 13-238 et al., at 36-37 (Feb. 3, 2014) (“PCIA 2014 Infrastructure Order Comments”).

<sup>71</sup> See *id.*

To further spur timely deployments, the FCC should include compound expansions in its expedited 60-day shot clock and include substantial modifications to existing structures in its 90-day shot clock. Currently, compound expansion in any direction triggers a new, onerous review under the longer 150-day shot clock. As such, consistent with the 2004 Nationwide Programmatic Agreement and similar to rules already adopted in a number of states, the FCC should permit expansion of the compound up to 2,500 square feet to be considered an Eligible Facilities Request and reviewed under the same expedited 60-day shot clock.<sup>72</sup> Under this framework, compound expansions would not amount to substantial modifications and should therefore receive expedited, 60-day review. Similarly, substantial modifications to existing tower structures should not be subject to the same review times as new support structures because a complete review was already conducted on the underlying infrastructure; they should accordingly be subject to a 90-day review. An expedited review time for compound expansions and substantial modifications would allow existing tower infrastructure to more readily support additional wireless providers or updated antenna technologies. Such an approach will foster competition and facilitate technology upgrades, such as a move from 4G to 5G—while maintaining a consistent level of service.

Finally, the Commission should shorten the longest applicable shot clock from 150 days to 120 days. As the age of 5G may require additional new support structures where collocation on an existing structure is not feasible, the FCC should ensure facilities that do not fit within the above categories for expedited review are nevertheless processed in an efficient manner. WIA posits that shortening the longest shot clock approximately one month—from 150 days to 120 days will promote efficient review without being unduly burdensome for local jurisdictions.

---

<sup>72</sup> See PCIA 2014 Infrastructure Order Comments at 38 n.128; *see generally* N.J. STAT. ANN. § 40:55D-46.2; MICH. COMP. LAWS. § 125.3514; N.H. REV. STAT. ANN. § 12-K:2.

**D. The Commission Should Clarify the Scope of the Shot Clocks and Identify Actions that Do Not or Extend Their Operation.**

The Commission should clarify that its shot clocks apply to all aspects of the wireless siting process, and that fee disputes, batched submissions, and moratoria do not toll or extend the shot clocks.

*Scope and commencement.* The Commission also should clarify that its shot clocks apply to all aspects of the wireless siting process. Localities should not be permitted to adopt “pre-application” filing requirements that must be satisfied before a wireless siting application can be filed to commence the shot clock. These pre-application requirements and procedures now are common and create delay.<sup>73</sup> In particular, localities should not be permitted to circumvent the proposed 60-day shot clock by stonewalling in response to a ROW access request by claiming that application procedures do not exist or are being reevaluated, and therefore the shot clock has not commenced. If a wireless provider seeks to deploy a small wireless facility in a ROW, the initial request to access the ROW should trigger the 60-day shot clock, as long as information similar to that required of wireline or utility applicants is provided. The Commission should also clarify that the shot clocks apply to all permits related to the application, including the issuance of a building permit. Many jurisdictions grant the application within the shot clock period only to stall on issuing the building permit. Absent these clarifications, the shot clocks are prone to continuing abuse and avoidance.

*Fee disputes.* The Commission should clarify that fee disputes between applicants and localities do not toll the various shot clocks. The record demonstrates that localities increasingly are charging excessive and discriminatory fees in order to obtain approval to deploy wireless

---

<sup>73</sup> See WIA Comments at 8; Reply Comments of WIA, at 5 (filed Apr. 7, 2017) (“WIA Reply Comments”); Crown Castle Comments at 21-22.

facilities. Given the importance of deploying wireless facilities, these disputes should not provide a basis for tolling shot clocks and delaying action on siting applications. The Commission should explore (perhaps through the BDAC process) ways to resolve fee disputes that would include a true-up mechanism to make localities whole for fees that were not collected during a dispute.

***Batched filings.*** Batch-filed applications should have no impact on the period deemed “reasonable” for reviewing applications.<sup>74</sup> For example, if a single application subject to the Section 6409(a) collocation shot clock is filed, a locality has 60 days to act on the application. If an entity submits multiple applications, each involving a single site, a locality still has 60 days to act on each application. If these applications are “batched” into a single filing, the timeframe for reviewing such applications should not be extended. By batching the applications, an applicant makes it easier for a locality to analyze the full scope of a project. Moreover, as ExteNet noted in response to the *2016 Streamlining Public Notice*, wireline applications involving numerous poles are processed in days or weeks.<sup>75</sup> There is no reason to subject batched small wireless facility applications to a lengthier review timeframe.

***Moratoria.*** In the *2014 Wireless Infrastructure Order*, the FCC held that moratoria do not toll the running of the Section 332 shot clocks.<sup>76</sup> The Commission should reiterate this finding, and explicitly state that moratoria on the filing, receiving, processing, or approval of requests to construct or modify small wireless facilities on municipal poles or in public ROWs do not toll the shot clocks.

---

<sup>74</sup> See *Wireless NPRM* ¶ 18 (seeking comment on the reasonable time frames for acting on small wireless facility siting applications that are submitted in “batches”).

<sup>75</sup> See ExteNet Comments at 38.

<sup>76</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971-72 ¶ 265.

**E. The Timelines and Permitting Processes Applicable to Small Wireless ROW Installations Should Not Exceed the Utility Siting Process.**

The Commission should declare that State and local regulations subjecting telecommunications deployments to longer or more onerous siting processes than non-telecommunications deployments violate Sections 253 and 332.<sup>77</sup> Such regulations are discriminatory and effectively prohibit service, contrary to both sections.<sup>78</sup>

As noted above, WIA members regularly encounter local governments that allow installation of utility facilities on utility poles in public ROWs subject only to permits that are granted on a ministerial basis, frequently “over the counter.”<sup>79</sup> Indeed, some cities require no permit whatsoever before installation on existing utility poles.<sup>80</sup> These communities generally refuse to apply the same rules if there is an antenna involved. Rather, when equipment is “wireless” in nature, those communities demand that “wireless” equipment be subject to myriad additional requirements and/or limitations.

The Commission should declare that local governments cannot require companies installing small wireless facilities to first obtain approval under the local zoning code if other entities are not required to obtain the same approvals for the deployment of similar facilities. Such a declaration by the Commission would be consistent with the Commission’s repeated prior

---

<sup>77</sup> See *Wireless NOI* ¶ 97.

<sup>78</sup> See *infra* Section III.

<sup>79</sup> See WIA Comments at 41.

<sup>80</sup> See, e.g., *T-Mobile West Corp. v. City & Cnty. of San Francisco*, No. CGC-11-510703, at 9 (Super. Ct. S.F. Cty. Nov. 26, 2014).

holdings that Section 253 prohibits local governments from discriminating against new entrants or new technologies.<sup>81</sup>

### **III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING INTERPRETING SECTIONS 253 AND 332(C)(7).**

The Commission should issue a declaratory ruling interpreting Sections 253 and 332(c)(7). The record compiled in response to the *2016 Streamlining Public Notice* reinforces that a declaratory ruling is needed because localities and courts do not have a clear understanding regarding the scope of these sections and how they relate to one another.<sup>82</sup>

Congress enacted Section 253(a) to ensure that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>83</sup> In Section 253(b), Congress reserved only to states the authority to adopt “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”<sup>84</sup>

While state or local governments may manage public ROWs and seek “fair and reasonable

---

<sup>81</sup> *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206 ¶ 31 (1997) (“*California Payphone*”); *see also The Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3470 ¶ 22.

<sup>82</sup> *See, e.g.*, Reply Comments of the Board of Supervisors of Fairfax County, Virginia, at 7 (filed Apr. 7, 2017); Comments of Texas Municipal League, at 22 (filed Mar. 8, 2017) (“Texas Municipal League Comments”); *see also* Comments of the National Regulatory Association of Utility Commissioners, at 12 (filed Mar. 8, 2017) (“Congress [made] clear that the reservation in § 253(c) is to be construed – if at all – by a court on a case-by-case basis.”); Comments of the City of New York, at 8 (filed Mar. 8, 2017) (“Congress intended that the courts, and not the Commission, have jurisdiction over matters implicating local management of rights-of-way.”).

<sup>83</sup> 47 U.S.C. § 253(a).

<sup>84</sup> *Id.* § 253(b).



compensation” for their use, such management and compensation must be “competitively neutral and nondiscriminatory,” and any required compensation must be “publicly disclosed.”<sup>85</sup> Section 253(d) also authorizes the Commission to preempt any legal requirement that violates Sections 253(a) or (b).<sup>86</sup>

In Section 332(c)(7), Congress preserved local zoning authority over wireless siting, subject to several important limitations. First, “regulation” of the placement, construction, and modification of wireless must not “unreasonably discriminate among providers of functionally equivalent services.”<sup>87</sup> Second, that regulation must not “prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>88</sup> And third, that regulation cannot regulate RF emissions, to the extent the facility complies with the FCC’s RF rules.<sup>89</sup>

Despite these statutory limitations, localities continue to adopt laws that prohibit or effectively prohibit wireless service, discriminate against wireless deployments, and impose excessive and/or discriminatory fees to deploy wireless facilities. Accordingly, a declaratory ruling by the Commission is appropriate. Importantly, the Commission’s interpretation will proactively guide local governments in their review and processing of requests to deploy wireless facilities—including requests to install small wireless facilities in the ROWs—and will

---

<sup>85</sup> *Id.* § 253(c).

<sup>86</sup> *Id.* § 253(d).

<sup>87</sup> *Id.* § 332(c)(7)(B)(i)(I).

<sup>88</sup> *Id.* § 332(c)(7)(B)(i)(II).

<sup>89</sup> *Id.* § 332(c)(7)(B)(ii). Also, as discussed above, states and localities must act on wireless facility siting requests within a “reasonable period of time” (*i.e.*, within the FCC shot clocks) and “may” challenge adverse siting decisions or the failure to timely act in court. *Id.* § 332(c)(7)(B)(v).

potentially avoid the need for piecemeal, reactive complaints filed against local governments before courts or the Commission.<sup>90</sup>

**A. The FCC Has Authority Under Sections 253 and 332 to Issue a Declaratory Ruling.**

The Commission has authority to issue a declaratory ruling interpreting Sections 253 and 332. The FCC has broad discretion as to how it conducts its proceedings,<sup>91</sup> including whether to proceed by declaratory ruling.<sup>92</sup> It is well established that the Commission can issue declaratory rulings interpreting ambiguous provisions of the Communications Act.<sup>93</sup> Indeed, the Supreme Court held in *AT&T Corp. v. Iowa Utilities Board* that the Commission has broad authority to interpret provisions of the Telecommunications Act of 1996, which includes Sections 253 and 332(c)(7).<sup>94</sup> Commission authority to interpret ambiguities has been upheld by courts on multiple occasions with respect to both Section 253<sup>95</sup> and 332(c)(7).<sup>96</sup>

Some local governments argue that the Commission’s ability to preempt pursuant to Section 253(d) does not extend to Section 253(c), and therefore any issues related to ROW

---

<sup>90</sup> *Alliance for Cmty. Media*, 529 F.3d at 775 (“While the Order equips LFAs with guidance on reasonable versus unreasonable distribution of franchises, the courts ultimately retain their Congressionally-granted jurisdiction to hear appeals involving denials of competitive franchises.”).

<sup>91</sup> *FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965); 47 U.S.C. § 154(j).

<sup>92</sup> See 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; see also *Viacom Int’l v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982); *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976).

<sup>93</sup> See *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14020 ¶ 67.

<sup>94</sup> *Iowa Utils. Bd.*, 525 U.S. at 377-78.

<sup>95</sup> See *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.11 (11th Cir. 2001); see also *N.Y. State Thruway Auth. v. Level 3 Commc’ns, LLC*, 734 F. Supp. 2d 257, 265 (N.D.N.Y. 2010).

<sup>96</sup> See *Montgomery County v. FCC*, 811 F.3d 121; *City of Arlington*, 668 F.3d 229, *aff’d*, 133 S. Ct. 1863 (2013); *Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 817 (2015).

management must be addressed by the courts rather than the Commission. But in *TCG New York, Inc. v. City of White Plains*, the court confirmed that “the plain language of the text which allows the FCC to preempt provisions inconsistent with subsection (a) strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption.”<sup>97</sup> Furthermore, “because § 253(c) provides a defense to alleged violations of § 253(a) or (b), if § 253(d) were read to preclude FCC consideration of disputes involving the interpretation of § 253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant’s answer, not the complaint.”<sup>98</sup> The Commission should find likewise here.

**B. The Commission Should Clarify the Scope and Breadth of Sections 253 and 332.**

As a preliminary matter, the Commission should clarify that Section 253 has a broader reach than Section 332 in three key ways.<sup>99</sup> First, the Commission should clarify that Section 253 applies to “any interstate or intrastate “telecommunications service”<sup>100</sup>—a broad term that includes wireless<sup>101</sup>—whereas Section 332(c)(7) applies more narrowly to “personal wireless services.”<sup>102</sup> As the Supreme Court has recognized, the provision of telecommunications services via wireless technologies is still “telecommunications service.”<sup>103</sup> As a result, Section 253 unquestionably applies to wireless deployments, including deployments in the ROW.

---

<sup>97</sup> *City of White Plains*, 305 F.3d at 75.

<sup>98</sup> *Id.* at 75-76.

<sup>99</sup> *See Wireless NOI ¶¶ 18-99.*

<sup>100</sup> 47 U.S.C. § 253(a) (emphasis added).

<sup>101</sup> *See Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 340 (2002) (“NCTA”).

<sup>102</sup> 47 U.S.C. § 332(c)(7).

<sup>103</sup> *NCTA*, 534 U.S. at 340-42.

Second, the Commission should clarify that Section 253 applies broadly to regulatory schemes and other requirements imposed by localities (including ROW access and franchise agreements), while Section 332 more narrowly applies to local zoning and siting decisions. That is, Section 253(a) preempts any “regulation, or other . . . legal requirement” that creates barriers to the provision of a telecommunications service,<sup>104</sup> whereas Section 332(c)(7)(B) addresses “decisions regarding” and “regulation of” the placement of personal wireless facilities.<sup>105</sup> Thus, while Section 332(c)(7) is a vehicle for appealing the denial of a specific, individual zoning application, Section 253 is an appropriate provision for challenges to the fundamental requirements imposed by local government.<sup>106</sup>

Third, the Commission should clarify that the discrimination analysis under Section 253 is broader than the functionally equivalent analysis under Section 332. While Section 332(c)(7)(B)(i)(I) prohibits States and local governments from “unreasonably” discriminating among functionally equivalent services, Section 253 has no modifier regarding whether the discrimination is “reasonable,” nor any consideration of “functionally equivalent services.” To the contrary, Section 253(c) states that local management of the ROW must be both “competitively neutral *and* nondiscriminatory.”<sup>107</sup> Thus, the scope of Section 253 is not as limited as Section 332(c)(7)(B)(i)(I).

---

<sup>104</sup> 47 U.S.C. § 253(a).

<sup>105</sup> *Id.* § 332(c)(7)(B).

<sup>106</sup> In *Cox Communications PCS, L.P. v. City of San Marcos*, for example, the district court specifically distinguished between Section 253, which “provides a cause of action against *local regulations*,” and Section 332(c)(7), which “gives a cause of action against *local decisions*.” *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *see also USCOC of Greater Mo., L.L.C. v. Vill. of Marlborough*, 618 F. Supp. 2d 1055, 1065 (E.D. Mo. 2009).

<sup>107</sup> 47 U.S.C. § 253(c) (emphasis added).

Indeed, the very purpose of Section 253 is to prevent discrimination among telecommunications providers, regardless of technology. If local governments are allowed to discriminate against small wireless facilities and other wireless providers in public ROWs based on arguments that the equipment is not identical in every respect to the equipment used by wireline providers and thus not “similarly situated,” then local governments would be allowed to discriminate against competitors using new, advanced technologies. Such a result would be inconsistent with Section 253 and the policies of the 1996 Act.<sup>108</sup>

In this regard, it is important to dispel any myth that wireless services and facilities do not compete with incumbent wireline providers. Consumer data overwhelmingly demonstrates that mobile devices directly compete with “traditional” wireline telecommunications services. Over half of adults in the country live in “wireless only” households that have cut the cord and no longer subscribe to landline telephone service.<sup>109</sup> Local government regulations must recognize that reality and treat wireless deployment in the public ROW in the same, largely ministerial manner as wireline technologies.

**C. The Effective Prohibition Test Under Section 253 Is Different than the Judicially-Crafted Test Under Section 332(c)(7).**

The Commission should clarify that the analysis of municipal requirements under Section 253 is not the same as the judicially-created standard for an “effective prohibition” of personal

---

<sup>108</sup> See H.R. Conf. Rep. No. 104-458, at 113, 126 (1996) (Conf. Rep.) (noting that the purpose of the 1996 Act is to “accelerate rapidly private sector deployment of advanced telecommunications” by, among other things, “remov[ing] all barriers to entry in the provision of telecommunications services”).

<sup>109</sup> Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, *Wireless substitution: Early release of estimates from the National Health Interview Survey, July–December 2016*, (May 2016), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>.

wireless service that is currently used in Section 332(c)(7)(B)(i)(II) cases. Some courts have improperly conflated the two.

Courts interpreting Section 332 generally have required applicants to establish that a denial “prohibits or has the effect of prohibiting” service by showing a significant gap in wireless coverage and a lack of a feasible alternative location.<sup>110</sup> Although this standard clearly was designed to address wireless deployments, the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego* concluded that this standard also should be applied to determine whether a local decision has the effect of prohibiting telecommunications service under Section 253(a), which applies to telecommunications services more broadly.<sup>111</sup> This interpretation is inconsistent with the Commission’s *California Payphone* order<sup>112</sup> and other court decisions.

Under *California Payphone*, for example, a regulation prohibits/effectively prohibits service under Section 253 if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>113</sup> This includes requirements that give local governments unfettered discretion over applications and/or impose lengthy or onerous application processes. This standard makes clear that an actual prohibition is not required—Section 253 bars regulations that “materially inhibit” the ability to compete.

---

<sup>110</sup> See *2016 Streamlining Public Notice*, 31 FCC Rcd at 13369.

<sup>111</sup> *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578-79 (9th Cir. 2008) (“*Sprint*”).

<sup>112</sup> See *California Payphone*, 12 FCC Rcd 14191.

<sup>113</sup> *Id.* at 14206 ¶ 31.

To prevent courts from misinterpreting the Section 253(a) and 332(c)(7) effective prohibitions standards in the future, the Commission should clarify both statutes as described below.

**1. The Commission Should Clarify That Section 253 Bars Regulations That Materially Inhibit or Impede Telecommunications.**

The Commission should declare that the Ninth Circuit’s decision in *City of Auburn v. Qwest Corp.*<sup>114</sup> and other similar cases that adopted and enforced the Commission’s *California Payphone* standard under Section 253, were correct, and that the restrictive interpretations adopted by the Ninth Circuit in *Sprint* and the Eighth Circuit in *Level 3 Communications, L.L.C. v. City of St. Louis*<sup>115</sup> and were incorrect.

Specifically, the Commission should declare that Section 253(a) is violated by any state or local requirements that: (i) “materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment;” or (2) impede, in combination or as a whole, the provision of any telecommunications service, including but not limited to requirements that leave local governments unfettered discretion over applications, significantly increase cost, and impose lengthy or onerous application processes.<sup>116</sup> Such an approach would be consistent with *City of Auburn*, which held that the city’s

---

<sup>114</sup> *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001), *overruled by Sprint*, 543 F.3d 571 (9th Cir. 2008).

<sup>115</sup> *Level 3 Commc’ns v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007).

<sup>116</sup> *See, e.g., RT Commc’ns, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000), *aff’g Silver Star Tel. Co.*, Memorandum Opinion and Order, 12 FCC Rcd 15639 (1997) (“*Silver Star*”), *recon. denied*, 13 FCC Rcd 16356 (1998); *City of White Plains*, 305 F.3d at 76; *Iowa Utils. Bd.*, 525 U.S. at 371 (1996 Act “fundamentally restructures local telephone markets. States may no longer enforce laws that *impede* competition . . . .” (emphasis added)); *City of Auburn*, 260 F.3d at 1175-76.

requirements, as a whole, had the effect of prohibiting the provision of telecommunications service. In particular, the court emphasized that the burdensome application process and the unfettered discretion left to the city had the effect of prohibiting telecommunications service in violation of Section 253.<sup>117</sup>

The Ninth Circuit’s reading of 253(a) in *City of Auburn* was approved by other circuit courts,<sup>118</sup> but not the Eighth Circuit.<sup>119</sup> Subsequently, an *en banc* panel of the Ninth Circuit overruled *City of Auburn*, stating it joined “the Eighth Circuit in holding that ‘a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.’”<sup>120</sup> The *Sprint* panel, however, went even further—it held that a challenge under Section 253(a) “must establish that no set of circumstances exists under which the [challenged regulation] would be valid.”<sup>121</sup>

The FCC should reject the *Sprint* approach, which effectively reads a requirement of insurmountability into Section 253 (i.e., that a regulation must make it completely impossible to provide telecommunications services to run afoul of the statute) that does not exist and is impossible to reconcile with the pro-competitive objectives of the 1996 Act. In its *Minnesota Order*, for example, the Commission explicitly rejected the argument that the availability of

---

<sup>117</sup> *City of Auburn*, 260 F.3d at 1178-79; *see also infra* Section III.E.2.

<sup>118</sup> *See, e.g., City of White Plains*, 305 F.3d at 78; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (relying on *City of White Plains* and *City of Santa Fe* for scope of Section 253(a) prohibition); *New Jersey Payphone Ass’n, Inc. v. Town of W. N.Y.*, 299 F.3d 235, 247 (declining to rule on franchise selection criteria but noting “that several of the criteria which the Town would apply have been rejected in connection with non-exclusive franchise schemes considered by other jurisdictions) (citing *City of Auburn*, 260 F.3d at 1178).

<sup>119</sup> *Level 3 Commc’ns*, 477 F.3d at 532-33.

<sup>120</sup> *Sprint*, 543 F.3d at 578 (quoting *Level 3 Commc’ns*, 477 F.3d at 533).

<sup>121</sup> *Id.* at 579 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).



alternative ROWs (i.e., theoretically feasible alternatives) meant that the state’s requirement did not effectively prohibit service in violation of Section 253(a).<sup>122</sup>

Courts have likewise ruled that local requirements need not be insurmountable to violate Section 253(a).<sup>123</sup> In *RT Communications, Inc. v. FCC*,<sup>124</sup> the Tenth Circuit—in a decision affirming the Commission’s decision in *Silver Star Telephone Co.*<sup>125</sup>—explicitly rejected the argument that a regulation must be a complete barrier to entry to violate Section 253(a). The court held that “*the extent to which the statute is a ‘complete’ bar is irrelevant. [Section] 253(a) forbids any statute which prohibits or has ‘the effect of prohibiting’ entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.*”<sup>126</sup>

The Second Circuit in *TCG New York, Inc. v. City of White Plains*, agreed with the Tenth Circuit’s holding that to violate Section 253(a) a prohibition does not need to be complete or “insurmountable.”<sup>127</sup> It also followed the Commission’s standard that an ordinance runs afoul of Section 253(a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment.”<sup>128</sup> Like the other courts, the Second Circuit emphasized that it must consider the impact of the ordinance as a whole because “applying [Section] 253(a) to individual provisions without considering the Ordinance

---

<sup>122</sup> *The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21709-10 ¶ 23 (1999) (“*Minnesota Order*”).

<sup>123</sup> See, e.g., *RT Commc’ns*, 201 F.3d 1264; *City of White Plains*, 305 F.3d at 76.

<sup>124</sup> *RT Commc’ns*, 201 F.3d 1264.

<sup>125</sup> See *Silver Star*, 12 FCC Rcd 15639.

<sup>126</sup> *RT Commc’ns*, 201 F.3d at 1268 (emphasis added).

<sup>127</sup> *City of White Plains*, 305 F.3d at 76.

<sup>128</sup> *Id.* (quoting *California Payphone*, 12 FCC Rcd at 14206 ¶ 31).

as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectable provisions.”<sup>129</sup>

And in *Qwest Corp. v. City of Santa Fe*, the Tenth Circuit reiterated that to establish a Section 253(a) violation, “[a] regulation need not erect an absolute barrier to entry . . . to be found prohibitive.”<sup>130</sup> Like other courts, it held that the “cumulative impact” of requirements could be prohibitive.<sup>131</sup> Notably, it held that Section 253(a) was violated because the challenged requirements gave the city “unfettered discretion” over whether a company could provide telecommunications service.<sup>132</sup> Consistent with *California Payphone*, the Tenth Circuit held that Section 253(a) was violated when the regulatory structure (which included, for example, broad discretion, vague “public interest” standards, and unlimited discretion to demand unidentified information) “denies telecommunications providers the ‘fair and balanced legal and regulatory environment’ the [1996 Act] was designed to create.”<sup>133</sup>

Finally, the First Circuit in *Puerto Rico Telephone Co. v. Municipality of Guayanilla* similarly held that a requirement “does not need to be complete or ‘insurmountable’ to run afoul of [Section] 253(a).”<sup>134</sup> It adopted the Commission’s formulation that a requirement has the effect of prohibiting telecommunications if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory

---

<sup>129</sup> *Id.* at 77.

<sup>130</sup> *City of Santa Fe*, 380 F.3d at 1269.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1270.

<sup>133</sup> *Id.* (quoting *California Payphone*, 12 FCC Rcd at 14206 ¶ 31).

<sup>134</sup> *Puerto Rico Tel.*, 450 F.3d at 18 (quoting *City of White Plains*, 305 F.3d at 76).

environment.”<sup>135</sup> The Commission should find likewise here, coupled with the *City of Auburn* gloss that a requirement may not impede the provision of a telecommunications service (including through requirements that leave local governments unfettered discretion over applications, significantly increase cost, and impose lengthy or onerous application processes).<sup>136</sup>

**2. The Commission Should Clarify That the Judicially-Created Substantial Gap Test Under Section 332 Is No Longer Workable.**

The Commission should also clarify the effective prohibition standard under Section 332(c)(7)(B)(i)(II). As interpreted by courts, the Section 332(c)(7) standard requires the showing of a “significant gap” in coverage and that the proposed facility is the “least intrusive means” of remedying the gap or there is no “feasible alternative.”<sup>137</sup> This judicially-crafted standard for Section 332(c)(7) “effective prohibition” claims is no longer workable, however, in the context of multi-node small wireless facility networks that add capacity where coverage may already exist.

The Section 332 standard was judicially created to deal with traditional tall towers on private property where one antenna can serve a large area. Conversely, the area covered by the average small wireless facility is only a few hundred feet.<sup>138</sup> The Commission should clarify that imposing this standard on small wireless facilities in the ROW is improper. Indeed, a standard that would effectively allow local governments to deny small wireless facility deployment in the public ROWs on the theory that some other “alternative” may exist would allow those local

---

<sup>135</sup> *Id.* (internal quotations omitted).

<sup>136</sup> *See also infra* Section III.E.2.

<sup>137</sup> *See 2016 Streamlining Public Notice*, 31 FCC Rcd at 13369-70 (citing cases).

<sup>138</sup> *See, e.g., id.* at 13363 n.17 (recognizing limited coverage of small wireless facilities).

governments to pick-and-choose technologies and services; those decisions, however, should lie with the provider based on customer demand, and not the locality.<sup>139</sup>

The importance of clarifying this issue is demonstrated by local governments who have suggested that small wireless facilities serve only to “improve” service quality, and thus there can never be a gap in service to support an “effective prohibition.”<sup>140</sup> Although the significant gap test is inappropriate for the reasons that WIA and others have articulated,<sup>141</sup> even if it applies, the Commission should make clear that a significant gap exists wherever a provider lacks adequate signal strength to provide in-building service *or* lacks adequate network capacity.<sup>142</sup> It is well-established from an RF engineering standpoint that lack of capacity leads to the same type of gap in service that a consumer would experience if there were inadequate signal “coverage.”<sup>143</sup> In both cases, the consumer will not be able to make or maintain a mobile connection in the manner they expect and demand.

This is another example where local governments seek to insert themselves as arbiters of technology and business needs and to manipulate the judicially-created “significant gap” test to limit deployment. If allowed to be applied to small wireless facilities, local governments would force providers to prove that there is a gap in service on a node-by-node basis. But that very

---

<sup>139</sup> *Cf. N.Y. SMSA Ltd. P’ship. v. Town of Clarkstown*, 612 F.3d 97, 105-06 (2nd Cir. 2010) (noting that “Federal law has preempted the field of the technical and operational aspects of wireless telephone service”).

<sup>140</sup> *See, e.g.*, Comments of Smart Communities Siting Coalition, at 26 (filed Mar. 8, 2017).

<sup>141</sup> *See, e.g.*, Verizon Comments at 21-22 (explaining why the Commission should reject the “significant gap” or “alternatives” standard altogether as anachronistic, contrary to the 1996 Act, and out of step with technological developments).

<sup>142</sup> *T-Mobile Cent. LLC v. City of Fraser*, 675 F. Supp. 2d 721, 728 (E.D. Mich. 2009) (recognizing that lack of capacity amounts to significant gap); *Cellular Tel. Co. v. Zoning Bd. of Adjustment*, 90 F. Supp. 2d 557, 565 (D.N.J. 2000) (same).

<sup>143</sup> *City of Fraser*, 675 F. Supp. 2d at 728.

standard was premised on a technology as it existed twenty years ago and is inappropriate in the context of a small wireless facility in the public ROW. The Commission should therefore clarify that cities are not allowed to require a showing of “need” or other business basis for deployment of small wireless facilities.<sup>144</sup>

**D. The Commission Should Address Excessive ROW and Non-ROW Fees and Charges That Impede Wireless Deployments.**

The Commission should clarify that all fees charged by localities with regard to wireless siting—whether in the context of ROW or non-ROW wireless facilities—must be nondiscriminatory and cost-based.<sup>145</sup> These fees can fall into numerous categories, including recurring fees, non-recurring fees, ROW access fees, municipal attachment fees, and application fees (hereinafter, “wireless siting fees”). Some of these fees—such as ROW access and municipal attachment fees—may apply only in the ROW context, but many of the other fees increasingly apply to all wireless deployments (i.e., even those outside of ROWs).

Exorbitant fees can be both effective prohibitions contrary to Sections 253(a) and 332(c)(7)(B)(i)(II), and discriminatory contrary to Sections 253(c) and 332(c)(7)(B)(i)(I). They stand as substantial barriers to the extensive deployment of wireless infrastructure. As Commissioner O’Rielly recently noted at WIA’s Wireless Infrastructure Show in the context of small ROW deployments:

It is also hard to argue that the excessive fees charged are fair and reasonable compensation for the use of the public rights of way. Fees typically include an exorbitant one-time payment – we have seen some localities charge as much as \$5,000 or \$10,000 per site

---

<sup>144</sup> T-Mobile Comments at 20; Verizon Comments at 21-22.

<sup>145</sup> See *2016 Streamlining Public Notice*, 31 FCC Rcd at 13371-73 (seeking comments on application processing fees and charges for the use of ROWs); *Wireless NPRM* ¶ 6 n.9 (inviting parties to reiterate arguments and data presented in response to the *2016 Streamlining Public Notice*); *Wireless NOI* ¶¶ 93-94 (seeking comment on whether application fees, recurring charges, and other fees charged for wireless facilities on non-ROW locations are excessive).

– to review antenna structure applications and agreements. Some localities also charge for the consultants reviewing siting applications, which can be \$8,500 per pole with additional inspection fees after installation. Some also charge recurring yearly fees of \$6,000 per pole, while others take a percentage of gross revenues. But this entire fee structure does not add up for small cell systems that can require a site every few blocks. There needs to be a declaration that fees similar to those imposed on macro towers are not appropriate or sustainable for small cell networks.<sup>146</sup>

**1. ROW Fees for Small Wireless Facilities Must Be Nondiscriminatory, Cost-Based, and Publicly Disclosed.**

The Commission should declare that fees imposed by local governments on small wireless facility deployments in public ROWs (i) must not exceed the fees (if any) imposed for similar, non-wireless telecommunications deployments, (ii) must be cost-based, and (iii) must be publicly disclosed. Commission action is necessary because, as discussed above, many local governments assess discriminatory fees for wireless deployments. They do so even though the deployments are nearly identical to (or smaller than) other “non-wireless” deployments in ROWs.

*Small wireless deployments are no different than other ROW occupants.* As WIA noted in its Reply Comments in WT Docket No. 16-421, cable operators and wireline telecommunications operators commonly install equipment on utility poles and such installations are far more common than any small wireless facility deployments.<sup>147</sup> For example, in the image below, which is in a residential area of Newport News, Virginia, there are cable television equipment boxes on every other pole, in front of homes. Likewise, the poles have electric cross arms and large transformers.

---

<sup>146</sup> Michael O’Rielly, Commissioner, FCC, Remarks at the Wireless Infrastructure Show, Orlando, FL, at 5 (May 23, 2017).

<sup>147</sup> WIA Reply Comments at 22-33.



A close-up of one of the cable TV equipment boxes shows that the box is accompanied by electric meter and shut off equipment.



Telecommunications fiber boxes are also installed on poles as shown in the photograph below (this image is also from Newport News, Virginia).



Even larger equipment is often installed by electric companies on poles in the public ROWs without zoning. A and B in the picture below are equipment installed by an electric company in Newport News that did not go through zoning for these electrical deployments.



Small wireless facilities are consistent with such existing installations, as the next photograph of a Crown Castle node in Newport News demonstrates. Crown Castle's node is on the pole on the left side of the road, across from the line of poles that are of equivalent height. Indeed, at least one of those other poles has a group of large electric transformers.





The following photographs show an ExteNet node in San Francisco surrounded by equivalent sized poles and equipment. None of the other equipment was required to obtain any site-specific permit from the City. In the first picture, the small wireless facility is on the pole in the center of the photograph. The pole on the left of the photograph has another company's equipment box and an electric transformer, and the pole across the street on the right side of the frame also has another company's equipment box. The second photograph depicts an ExteNet small wireless facility deployment on the first of a string of utility poles.





Below are additional examples of small wireless facility installations that blend seamlessly with the existing infrastructure.



(AT&T installation on existing utility pole in Los Angeles with electric distribution and other telecommunication installations)



(AT&T installation in Hunter Mill, VA)



(AT&T node on municipal light pole in Manhattan)



(AT&T nodes on San Francisco light poles)

These photographs confirm that small wireless facilities, as defined by WIA and others, are similar to other ubiquitous facilities installed in the public ROWs. Not surprisingly, various courts concur. For example, the trial court in *T-Mobile West Corp. v. City & County of San Francisco* held that AT&T and Comcast install equipment cabinets on utility poles that are “identical” to the cabinets used by T-Mobile, Crown Castle, and ExteNet for their small wireless facility installations.<sup>148</sup> Similarly, the U.S. District Court for the Eastern District of Virginia found that the “equipment installed by Verizon, Dominion, and Cox is often similar in size *and sometimes larger than* the Crown Castle equipment attached at each of the four [small wireless facility] locations” in Newport News, Virginia.<sup>149</sup>

---

<sup>148</sup> See *T-Mobile West Corp.*, No. CGC-11-510703, at 9.

<sup>149</sup> *Crown Castle NG Atlantic, LLC v. City of Newport News*, 2016 U.S. Dist LEXIS 104790, at \*32 (E.D. Va. Aug. 8, 2016) (emphasis added).



Simply put, there is no justification for municipal fees imposed on “wireless” equipment to be higher simply because they are wireless in nature, nor is any greater management burden imposed on local governments to manage wireless deployments as opposed to landline, cable, or utility ROW deployments. To the extent that local governments claim there are greater management costs, it may be because those local governments have imposed uniquely burdensome regulations only on wireless equipment in the ROWs.

***Public ROW fees cannot be discriminatory.*** The Commission should therefore declare that municipal ROW fees imposed on small wireless facilities must be no more than the fees, if any, imposed on other telecommunications carriers for occupation of the public ROWs, depending on the amount of ROW actually occupied. Such action would be consistent with the plain text of Section 253 which states that fees for ROW access must be “nondiscriminatory.”<sup>150</sup>

The Commission and numerous courts have recognized that municipal fee demands that are imposed on one set of providers but not others effectively prohibit the provision of telecommunications service in violation of Section 253(c).<sup>151</sup> As the Second Circuit recognized in *White Plains*, a local government cannot impose a fee structure that gives one provider an inherent competitive cost advantage over other providers:

If TCG is required to pay five percent of its gross revenues to the City and Verizon is not, competitive neutrality is undermined. Verizon will have the advantage of choosing to either undercut TCG’s prices or to improve its profit margin relative to TCG’s profit margin. Allowing White Plains to strengthen the competitive

---

<sup>150</sup> 47 U.S.C. § 253(c).

<sup>151</sup> *City of White Plains*, 305 F.3d at 79 (citing Preamble, 104 P.L. 104, 110 Stat. 56); *see also Minnesota Order*, 14 FCC Rcd at 21713-14 ¶¶ 28-29. The Commission and courts also have concluded that costs imposed only on new entrants are barriers to entry. *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report, 9 FCC Rcd 7442, 7621-22 ¶ 29 (App. H) (1994); *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 (9th Cir. 1993).

position of the incumbent service provider would run directly contrary to the pro-competitive goals of the TCA.<sup>152</sup>

When cities seek payments for occupation of the public ROWs by “wireless” equipment that exceed the payments demanded of other telecommunications providers who occupy utility poles in the same ROWs—or worse, where no fee is required of other telecommunications providers at all—they are acting in a discriminatory manner.

The Commission should emphasize that Section 253 and the 1996 Act as a whole are technology neutral, and different fees cannot be justified based on narrow characterizations of certain equipment or technology. In particular, the Commission should explicitly declare that Section 253 prohibits local governments from discriminating against wireless equipment, and reject the theory that a local government may discriminate in such a manner if it regulates all “wireless” installations the same. Arguments that Section 253 allows fees that treat one narrowly defined group of providers the same have been rejected repeatedly by the Commission and the courts.<sup>153</sup> Indeed, the Commission filed an *amicus* brief before the Second Circuit in *White Plains* in which it stated that “a local telephone franchise fee that applies only to new entrants and not to incumbent local exchange carriers is not competitively neutral and nondiscriminatory under section 253(c).”<sup>154</sup>

---

<sup>152</sup> *City of White Plains*, 305 F.3d at 79 (citing Preamble, 104 P.L. 104, 110 Stat. 56); *see also Minnesota Order*, 14 FCC Rcd at 21713-14 ¶¶ 28-29.

<sup>153</sup> *RT Commc’ns*, 201 F.3d at 1269 (rejecting argument that regulation was “competitively neutral” because it treated all *new* entrants the same) (emphasis added); *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443 ¶ 108 (1997) (“*TCI Cablevision*”) (“Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory”).

<sup>154</sup> FCC Br. in *City of White Plains*, 2001 WL 34355501, at \*8. The Commission concluded that “the five percent gross revenue fee impose[d] on TCG [is] an additional cost of doing business in

***Public ROW fees cannot exceed management costs.*** The Commission should also declare that Section 253(c) limits the amount of ROW access fees to recovery of the municipality's actual cost of managing the occupation of the ROW by the wireless facility network.<sup>155</sup> Such action will help “ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace.”<sup>156</sup>

Although some jurisdictions properly limit ROW access fees to actual management costs,<sup>157</sup> others seek to charge fees based on the false notion of a “fair market value” of the public ROW.<sup>158</sup> There can be no “fair market value” for ROW access given that localities exercise monopoly control over such access.<sup>159</sup> Commission action is necessary—in the form of a declaratory ruling—to prevent localities from charging monopoly rents for ROW access. Such fees constitute barriers to deployment and ultimately raise costs for consumers.

WIA agrees with Commissioner O’Rielly that the infrastructure siting process should not be used as “a means to increase revenues.”<sup>160</sup> Many localities, however, have retained

---

the City that is not imposed on its incumbent competitor . . . that inevitably puts TCG at a pricing disadvantage in relation to Verizon.” *Id.* at \*15-16.

<sup>155</sup> “Actual costs” should be limited to the costs directly related to administering the ROW permitting process and managing the ROW.

<sup>156</sup> Clyburn Remarks at 4.

<sup>157</sup> Cal. Gov’t Code 50030; Minn. Stat. §§ 237.162-163, 257.162; Utah Code Ann. §§ 72-7-102, 10-1-46.

<sup>158</sup> See, e.g., Comments of City of Newport Beach, at 1 (filed Feb. 14, 2017) (filed as City of North Beach); Comments of the Board of County Road Commissioners of the County of Oakland, Michigan, at 9 (filed Mar. 7, 2017); Comments of the Cities of San Antonio, Texas et al., at 27-28 (filed Mar. 8, 2017) (“San Antonio Coalition Comments”); Comments of the South Dakota Department of Transportation, at 4-5 (filed Mar. 6, 2017).

<sup>159</sup> See, e.g., AT&T Comments at 18; ExteNet Comments at 41; Mobilitie Comments at 10-12; Sprint Comments at 33; Comments of TechFreedom, at 5 (filed Mar. 8, 2017); WIA Comments at 69.

<sup>160</sup> *Wireless NPRM* Statement of Commissioner Michael O’Rielly.

consultants for that very reason. For example, after retaining a consultant, one city in Minnesota demanded that a company seeking to deploy facilities in the ROW pay more than fourteen times the amount the city had negotiated with another entity three years prior. A similar consultant called “5 Bars” advertises its abilities to “optimize new City revenue sources from wireless infrastructure.”<sup>161</sup>

The call for Commission intervention to address this issue is not new. Numerous commenters in WT Docket No. 16-421 urged the Commission to limit fees charged for the use of public ROWs to actual management costs.<sup>162</sup> Such fees “should be commensurate with the cost to the jurisdiction of reviewing the application and maintaining the applicable rights-of-way, rather than some purported estimate of the value to the provider.”<sup>163</sup>

There is significant legal and policy support for such an interpretation. The Supreme Court has consistently found that municipal ROW access charges must be reasonable and implied that reasonableness is related to a municipality’s costs. For example, in *City of St. Louis v. Western Union Tel. Co.*, the Supreme Court opined that cities could require telephone companies to “*contribut[e] something towards the expense*” the city had to bear as a condition for ROW access.<sup>164</sup> Similarly, in *Postal Tel.-Cable Co. v. City of Richmond*, it held that a

---

<sup>161</sup> See 5 Bars, Communities, <http://5bars.com/communities> (last visited June 12, 2017).

<sup>162</sup> See, e.g., CCA Comments at 15-16; Comments of Conterra Broadband Services and Uniti Fiber, at 7-8, 18-23 (filed Mar. 8, 2017) (“Conterra Comments”); Crown Castle Comments at 28; CTIA Comments at 28-33; ExteNet Comments at 39; Globalstar, Inc. Comments at 14; Lightower Comments at 27, 29; Mobilitie Comments at 17; Sprint Comments at 32-39; Verizon Comments at 14-18; WIA Comments at 67-69; Comments of the Wireless Internet Service Providers Association, at 6 (filed Mar. 8, 2017) (“WISPA Comments”).

<sup>163</sup> Crown Castle Comments at 28.

<sup>164</sup> *City of St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 470 (May 15, 1893) (emphasis added).



municipality can seek compensation for ROW access so long as “the charge made is *reasonably proportionate to the service to be rendered [by the city] and the liabilities involved . . .*.”<sup>165</sup>

More recent Federal court decisions also limit local government ROW fees to recovery of their actual cost of managing the telecommunications provider’s use of the public ROWs. In *White Plains*, the Second Circuit explained that “Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns.”<sup>166</sup> The First Circuit reiterated that holding in *Puerto Rico Telephone*.<sup>167</sup>

The limitation to costs is supported by the legislative history of Section 253. Senator Dianne Feinstein, during the floor debate on Section 253(c), offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including “require[ing] a company to pay *fees to recover an appropriate share of the increased street repair and paving costs* that result from repeated excavation.”<sup>168</sup> Congress intended to preserve the ability of cities to recover the costs directly created by managing the new occupation, not to allow cities to profit from new technologies and competition.

The Commission has also previously articulated the concern that Section 253(c) prohibits cities from profiting from the public ROWs. In its *Amicus Curiae* brief to the Second Circuit in *White Plains*, the Commission explained that “there also is a serious question whether a gross revenues based fee is ‘fair and reasonable compensation . . . for use of public rights of way’”

---

<sup>165</sup> *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252, 260 (1919) (analyzing ROW fee in terms of the costs incurred by the City in regulating and inspecting the poles located in ROWs).

<sup>166</sup> *City of White Plains*, 305 F.3d at 79.

<sup>167</sup> *Puerto Rico Tel.*, 450 F.3d at 22 (quoting *White Plains*, 305 F.3d at 79).

<sup>168</sup> 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added); *see also Classic Tel., Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103 ¶ 39 (1996) (“*Classic Tel.*”).

because “a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry.”<sup>169</sup> Indeed, the Commission went further, stating that “there is a vast difference between a regime in which fees vary in dollar amount among local exchange carriers *depending on the costs each inflicts*, and the City’s blanket exemption of Verizon from rights-of-way fees based only on its position as an incumbent. *The former . . . is what Congress intended section 253(c) to permit.*”<sup>170</sup>

***Public ROW fees must be publicly disclosed.*** To ensure non-discriminatory treatment, the Commission should find that fees charged for ROW access must be publicly disclosed.<sup>171</sup> A critical component of the Section 253(c) limit on local government fees is the requirement that such fees also be publicly disclosed in advance. Section 253(c) provides that nothing in the section affects the authority of local governments to impose fair and reasonable, competitively neutral and nondiscriminatory fees “if the compensation required is publicly disclosed by such government.”<sup>172</sup> The Commission should emphasize that this explicit statutory requirement cannot be ignored by localities. To ensure disclosure, the Commission should declare that compensation regimes that are not publicly disclosed are unreasonable and violate Section 253 and that municipalities are barred from collecting such fees.

---

<sup>169</sup> FCC Br. in *City of White Plains*, 2001 WL 34355501, at \*14 n.7 (quoting *New Jersey Payphone Ass’n, Inc. v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001)).

<sup>170</sup> *Id.* at \*14 (emphasis added).

<sup>171</sup> See, e.g., CCA Comments at 9, 19-20; Conterra Comments at 23; ExteNet Comments at 39; Lighttower Comments at 27, 29; Mobilitie Comments at 17; WISPA Comments at 8.

<sup>172</sup> 47 U.S.C. § 253(c); *Peco Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, at \*18.

## **2. Local Zoning or Wireless Siting Fees for Non-ROW Deployments Should Be Cost-Based.**

The Commission should declare that all local zoning and wireless siting fees—whether for sites located inside or outside of ROWs—must be cost-based.<sup>173</sup> As noted above, these fees can include recurring and non-recurring fees and application fees. Other examples include consultant fees, inspection fees, and escrow requirements.

Unreasonable fees constitute a barrier to wireless broadband deployment and whether or not a fee is excessive should not hinge solely upon the location of wireless facility. Outside of ROWs, excessive wireless siting fees have the effect of prohibiting service in violation of both Sections 253(a) and 332(c)(7). Although localities should be able to recoup the costs associated with reviewing wireless siting applications, they should not be permitted to use the wireless siting process as a revenue-generating mechanism. Revenue-generating fees substantially increase costs and can effectively prohibit the provision of service.

Some states already have adopted or are considering legislation mandating that wireless siting fees must be cost-based.<sup>174</sup> A nationwide approach is necessary, however, to facilitate wireless broadband deployment universally. To eliminate non-cost-based fees as a barrier to deployment and ensure that wireless broadband services can be provided, the Commission should declare that such fees violate Sections 253(a) and 332(c)(7) and preempt them pursuant to Section 253(d).

---

<sup>173</sup> See *Wireless NOI* ¶ 93; see also CCA Reply Comments at 10.

<sup>174</sup> See, e.g., MO. REV. STAT. § 67.5094(11).

**E. The Commission Should Define Other Actions That Effectively Prohibit or Discriminate Against Wireless Deployments.**

As discussed above, the Commission has a clear record that jurisdictions are effectively prohibiting the provision of wireless telecommunications, notably through their treatment of small wireless facilities in the public ROWs. In addition to delays and excessive fees, many cities are imposing moratoria—either explicit or *de facto*—in response to applications to install wireless facilities.<sup>175</sup> And many other cities are imposing extensive zoning or other discretionary requirements that discriminate against wireless facilities and impose regulations that effectively prohibit the provision of telecommunications services. The Commission should declare that these actions effectively prohibit or discriminate against wireless deployments, contrary to Sections 253 and 332.

**1. The Commission Should Declare That Moratoria on Wireless Facility Deployments Are Prohibited.**

Based on the impact of moratoria on WIA's members, the Commission should declare that moratoria on the deployment of wireless and/or telecommunications facilities are prohibited because they create barriers to entry and prevent the provision of wireless services, contrary to Sections 253 and 332.<sup>176</sup> The Commission is to be commended for recognizing that wireless siting moratoria are unacceptable and action may be necessary to curb the use of moratoria to delay wireless deployments.<sup>177</sup> Despite its express statement in the *2014 Wireless Infrastructure Order* that moratoria cannot be used to delay processing wireless siting applications,<sup>178</sup> as

---

<sup>175</sup> See, e.g., ExteNet Comments at 5-6; Crown Castle Comments at 15-19; Lighttower Comments at 10-11.

<sup>176</sup> See *Wireless NPRM* ¶ 22 (seeking comment on whether to address the legality of moratoria on the deployment of wireless or telecommunications facilities); *Wireline NOI* ¶ 102 (same).

<sup>177</sup> See *Wireless NPRM* ¶ 22.

<sup>178</sup> *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971 ¶265.

discussed above localities continue to adopt moratoria and rely on them as a basis for refusing to act on wireless siting applications.

*De facto* moratoria have also been imposed across multiple jurisdictions. These jurisdictions have not specifically passed ordinances putting moratoria in place, but have informally suspended the acceptance or processing of small wireless facility applications—or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered.<sup>179</sup>

Other localities have implemented “undergrounding” ordinances that effectively constitute moratoria.<sup>180</sup> Undergrounding ordinances may be reasonable when applied to telecommunications and utility facilities (and even backhaul) that can be placed underground, but are unreasonable in the context of wireless antennas. The vertical components of wireless networks—the antennas—cannot be constructed underground due to their need to transmit wireless signals. Accordingly, undergrounding ordinances erect a barrier to entry and effectively prohibit the deployment of wireless facilities.<sup>181</sup>

Based on the foregoing, the Commission should declare that any ordinances or policies—whether formal moratoria, undergrounding ordinances, or ROW access restrictions—that prohibit wireless deployments (or preclude action on wireless applications within a reasonable period of time) are prohibited by Sections 253 and 332.

---

<sup>179</sup> WIA Comments at 16.

<sup>180</sup> AT&T Comments at 8; Mobilitie Comments at 12-13.

<sup>181</sup> At a minimum, the Commission should carefully scrutinize undergrounding ordinances that only permit use of municipally-owned poles. In many cases, these ordinances are used to create a monopoly for the municipality, which then seeks to charge exorbitant fees for access to these poles. And as discussed above, such exorbitant fees can effectively prevent deployment.

## **2. The Commission Should Declare That Certain Requirements Unrelated to Management of the ROW Are Prohibited.**

The Commission should declare that the Ninth Circuit in *City of Auburn* correctly held that Section 253 preempts certain municipal application and substantive requirements imposed on ROW applicants that have nothing to do with the management or use of the ROW, including:

- A lengthy and detailed application form, requiring disclosure of matters such as
  - Maps,
  - Corporate policies,
  - Documentation of licenses,
  - Financial, technical, and legal qualifications,
  - A description of all services provided currently or in the future, and
  - Such further information “as may be requested” by the city;
- A requirement for a public hearing on the application;
- Unbridled discretionary factors unrelated to management or use of the ROW;
- Regulations governing the transferability of ownership, and even stock sales;
- Municipal reservation of discretion to grant, deny, or revoke the franchises;
- Reporting requirements not related to management of the ROW; and
- “Most favored community” status regarding rates, terms, and conditions of service.<sup>182</sup>

The Commission should declare that these and other requirements are not related to management of the ROW. As *City of Auburn* recognized, the argument that “management” of the ROW allows cities to broadly regulate all aspects of the facilities in the ROW is a “semantic two-step” under which “the safe harbor provisions would swallow whole the broad congressional preemption.”<sup>183</sup> Rather, the Commission should reiterate that the ROW management tasks reserved to municipalities are limited and include only matters such as “coordination of construction schedules, determination of insurance, bonding and indemnity requirements,

---

<sup>182</sup> See WIA Comments at 49-50.

<sup>183</sup> *City of Auburn*, 260 F.3d at 1180.

establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.”<sup>184</sup> The discretionary role cities now seek to enforce is not management of the public ROWs as envisioned by Congress.

### **3. The Commission Should Declare That Certain Conditions Imposed on Wireless Siting Approvals Are Unreasonable.**

The Commission should identify conditions that are *per se* unreasonable and thus cannot be imposed by local authorities as part of the wireless and telecommunications permitting process.<sup>185</sup> Commission action is necessary because, as discussed in Section I, WIA’s members often are required either (i) to accept onerous, unreasonable conditions as part of the wireless permitting process or (ii) engage in lengthy and costly litigation over the legality of such conditions.

Given the leverage localities have over wireless and telecommunications providers, the mere fact that a provider has executed an agreement with a local government for ROW access does not mean the terms and conditions are reasonable. Far too often, such agreements are the result of multi-year delays and reflect the fact that providers have little or no alternative. Providers must either accept the local government’s demands or they will not be able to provide service. To address these concerns, the Commission should clarify that conditions unrelated to objective, nondiscriminatory health and safety concerns are unreasonable *per se* and cannot be imposed by local authorities as part of the wireless and telecommunications permitting process.

---

<sup>184</sup> *AT&T Commc’ns Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591-92 (ND Tex. 1998) (citing *TCI Cablevision*, 12 FCC Rcd at 21441 ¶ 103 and *Classic Tel.*, 11 FCC Rcd at 13082 ¶ 40); *see also Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227 (1996).

<sup>185</sup> *See Wireless NPRM* ¶ 21 (seeking comment on whether certain conditions imposed on wireless and telecommunications siting approvals are unreasonable); *Wireline NOI* ¶ 106 (same).

**4. Aesthetics Should Not Play a Role If Other Telecom and Utility Providers Are Not Subject to Similar Aesthetic Review.**

The Commission also should declare that it is unreasonable for localities to use aesthetics in small wireless facility permitting decisions if aesthetics were not used in reviewing similar deployments by utilities or wireline telecommunications providers. As demonstrated above, small wireless facilities essentially are identical in size and appearance to utility and wireless telecommunications equipment deployed on poles in the public ROWs. Courts have recognized this similarity.<sup>186</sup> The only reason that local governments are treating these installations differently is because of the wireless nature of the equipment. Any assertion made about the need to review small wireless facility proposals is also true of all the other telecommunications and utility equipment in public ROWs—which are identical in size and appearance. Accordingly, there is no valid basis for local authorities to claim that review of small wireless facility deployments requires lengthy and burdensome applications and reviews.

**F. The Commission Should Clarify That Access to Public Poles and ROWs Implicates Regulatory Functions Subject to Sections 253/332.**

The Commission should clarify that management of and access to ROWs and associated poles implicate local authorities' regulatory authority and are not proprietary functions.<sup>187</sup> Many localities filed comments in response to the *2016 Streamlining Public Notice* claiming that Sections 253 and 332 are limited to regulatory actions and therefore are inapplicable to ROW approvals, which they wrongly classify as “proprietary” in nature.<sup>188</sup> The Commission should

---

<sup>186</sup> See, e.g., *T-Mobile West Corp.*, No. CGC-11-510703, at 9; *City of Newport News*, 2016 U.S. Dist. LEXIS 104790, at \*32.

<sup>187</sup> See *Wireless NOI* ¶ 96 (seeking comment on the distinction between governmental actions that are “proprietary” and those that are “regulatory.”).

<sup>188</sup> See, e.g., San Antonio Coalition Comments at 14-15; Texas Municipal League Comments at 6-9; Joint Comments of League of Arizona Cities and Towns et al., at 3-10 (filed Mar. 8, 2017); Comments of the City of Bellevue et al., at 9-10 (filed Mar. 6, 2017).



reject these claims and clarify that (i) ROW management is a regulatory function subject to Section 332 and (ii) Section 253 applies to ROW management regardless of whether it is classified as regulatory or proprietary function.

Congress recognized the importance of ROWs for public purposes and “the land-grant program that led to the great railroads of the nineteenth century, including the Union Pacific, called for joint development of railroads and the telegraph.”<sup>189</sup> But for the economies of scale and low cost operation associated with ROWs, these public benefits would not have been possible.<sup>190</sup> The establishment of ROWs was essential to, among other things, the creation of mass transit, electricity, and wired telephones/telegraphs.<sup>191</sup>

Local governments thus hold the public ROWs in trust for the public benefit, not as private or proprietary land owners.<sup>192</sup> Although numerous courts have reached this conclusion,<sup>193</sup> several municipalities cite to an 1863 United States Supreme Court decision supposedly authorizing them to charge “rent” for use of the public ROWs.<sup>194</sup> Their reliance is misplaced.

---

<sup>189</sup> See Randal C. Picker, *Panel III: Does Regulation Promote Efficiency in Network Industries? Regulating Network Industries: A Look at Intel*, 23 HARV. J.L. & PUB. POL’Y 159, 160-61 (1999).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at \*16-18 (S.D.N.Y. 2004) (holding that City’s requirements and fees for use of city-owned poles “are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy”); *City of Mission v. Popplewell*, 294 S.W.2d 712, 715 (Tex. 1956) (“The city controls the streets as trustee for the public. It has no proprietary title nor right to exclusive possession.”).

<sup>193</sup> See, e.g., *City of St. Louis*, 149 U.S. 465; *Mackay Tel. & Cable Co. v. City of Little Rock*, 250 U.S. 94, 99 (1919); *Western Union Tel. Co. v. Borough of New Hope*, 187 U.S. 419, 426 (1903); *City of Mission*, 294 S.W.2d at 715; *Cotrone v. City of New York*, 237 N.Y.S.2d 487, 489 (N.Y. Sup. Ct. 1962); *AT&T Co. v. Village of Arlington Heights*, 620 N.E.2d 1040, 1042 (Ill. 1993).

<sup>194</sup> *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).

The Supreme Court itself reconsidered the cited case two months later and *abandoned* the concept of a proprietary function justifying a “rent.”<sup>195</sup> Although the Court did not explain the reason for its reconsideration, it upheld the city’s per-pole charge not as “rent,” but as an exercise of the city’s charter power “to license, tax *and regulate* . . . telegraph companies.”<sup>196</sup> Thus, the Supreme Court held that the power to charge for ROW access is tied to regulatory power—not proprietary actions.

Further, even assuming *arguendo* that ROW management could be considered a purely proprietary function, Section 253 still would apply. Section 253(a) applies preempts any “regulation, or *other . . . legal requirement.*”<sup>197</sup> Thus, whether the city’s actions are “regulatory” or “proprietary” is irrelevant under Section 253—if wireless providers are legally required to comply with local ROW restrictions and conditions, Section 253 applies.

In its *Minnesota Order*, the Commission addressed an attempt by the State of Minnesota to enter into an agreement granting a single entity the exclusive right to construct fiber in the state’s ROWs.<sup>198</sup> The State argued that the agreement was a proprietary action and not a “legal requirement” under Section 253(a), and thus not within the limitations of the statute. The Commission rejected the argument, interpreting the scope of Section 253(a)’s “legal requirement” language to be broad, and specifically holding that Section 253(a) does not limit its preemptive effect to “regulations”:

We conclude that Congress intended that the phrase, “State or local statute or regulation, or other State or local legal requirement” in section 253(a) be interpreted broadly. The fact that Congress included the term “other legal requirements” within the scope of

---

<sup>195</sup> *City of St. Louis*, 149 U.S. 465.

<sup>196</sup> *Id.* at 468 (emphasis added).

<sup>197</sup> 47 U.S.C. § 253(a).

<sup>198</sup> *Minnesota Order*, 14 FCC Rcd at 21725 ¶ 52.

section 253(a) *recognizes that State and local barriers to entry could come from sources other than statutes and regulations*. The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services. We believe that interpreting the term “legal requirement” broadly, best fulfills Congress’ desire to ensure that states and localities do not thwart the development of competition.<sup>199</sup>

The Commission reached the correct conclusion. Any other interpretation “would effectively rewrite Section 253, allowing municipalities complete liberty to prevent wireless facilities in the ROW or to impose unreasonable conditions and exorbitant fees for ROW access.”<sup>200</sup>

#### **IV. THE COMMISSION SHOULD CONTINUE TO EXPEDITE AND ELIMINATE UNECESSARY ENVIRONMENTAL REVIEWS.**

To further speed wireless facility deployments, the FCC should continue efforts to streamline its rules implementing the National Environmental Policy Act (“NEPA”), and expand and simplify its National Historic Preservation Act (“NHPA”) categorical exclusions to promote 5G deployment. WIA also supports efforts to reform the Tribal review process and resolve the treatment of Twilight Towers, and generally is addressing those issues in a separate pleading filed on this day jointly with CTIA.<sup>201</sup>

##### **A. The Commission Should Further Streamline the NEPA Review Process.**

As discussed below, the Commission should (i) eliminate the need to file an environmental assessment (“EA”) for wireless facilities to be located in a floodplain where the facilities will be constructed at least one foot above the base flood elevation and local building

---

<sup>199</sup> *Id.* at 21707 ¶ 18 (emphasis added) (citations omitted).

<sup>200</sup> Reply Comments of AT&T, at 2 (filed Apr. 7, 2017).

<sup>201</sup> *See* Joint Comments of CTIA and WIA on Advancing Effective Tribal Consultation Under Section 106 of the NHPA, WT Docket No. 17-79 (June 15, 2017).

permits have been obtained; (ii) expand the NEPA categorical exclusions for small wireless facilities; and (iii) establish shot clocks to process EAs and resolve environmental delays and disputes.

**1. EAs Should Not Be Required for Wireless Facilities Built in Floodplains Above the Base Flood Elevation.**

The Commission should eliminate the need to file an EA for wireless facilities to be located in a floodplain where the facilities will be constructed at least one foot above the base flood elevation and local building permits have been obtained.<sup>202</sup> In response to the *2016 Streamlining Public Notice*, WIA and others urged the Commission to take this action. As the record compiled in response to the *2016 Streamlining Public Notice* demonstrates, this requirement imposes unnecessary delays on constructing facilities.<sup>203</sup>

The Commission currently requires applicants proposing to construct facilities in a floodplain to demonstrate, as part of the EA process, that the structure (i) will comply with local building codes (as evidenced by a building permit) and (ii) will be located at least one foot above the base flood elevation.<sup>204</sup> Where these factors are demonstrated, Commission approval is granted. Thus, rather than require the submission of EAs in these situations—which imposes costs (on both the industry and the Commission) and triggers a lengthy review process—the Commission should eliminate the requirement. Given the long history of reviewing floodplain EAs and the routine determination that no adverse environmental impact will occur when the two

---

<sup>202</sup> See *Wireless NPRM* ¶ 65 (seeking comment on whether to eliminate the need to file an EA for wireless facilities to be located in a floodplain).

<sup>203</sup> See, e.g., Verizon Comments at 38-39; T-Mobile Comments at 39-40.

<sup>204</sup> See *Final Programmatic Env'tl. Assessment*, 2012 FCC LEXIS 1141, \*182 (Mar. 13, 2012); Robert B. Jacobi, Esq., Letter, 26 FCC Rcd 3883, 3892 (MB 2011); Andrew Skotdal, President S-R Broadcasting Co., Inc., Letter, 23 FCC Rcd 8574, 8583 (MB 2008); *Application of American Tower Corporation For Tower Registration with Environmental Assessment*, Memorandum Opinion and Order, 21 FCC Rcd 1680, 1683-84 (WTB 2006).

factors are met, eliminating the EA requirement in such circumstances will not harm the environment.

## **2. NEPA Categorical Exclusions for Small Wireless Facilities Should Be Expanded.**

The Commission can facilitate wireless deployment, without raising environmental concerns, by expanding the categorical exclusions for small wireless facilities and associated support structures set forth in its rules implementing NEPA.<sup>205</sup> Currently, the Commission generally excludes collocations, including the collocation of small wireless antennas associated equipment on existing structures, from environmental review (provided historic preservation or RF compliance concerns are not present).<sup>206</sup> However, new and replacement support structures generally remain subject to full environmental review, unless they meet certain size and excavation requirements and are located in ROWs actively used for communications or above-ground utilities.<sup>207</sup> As a consequence, many new or replacement support structures associated with small wireless facilities needed to support 5G deployments will be subject to full environmental review if they do not fall within the existing, narrow ROW exclusion.

To address this gap in the rules and maximize the benefits of minimally-impactful 5G deployments, the Commission should expand the scope of the NEPA categorical exclusion to include the deployment of small wireless facilities on new or replacement poles, regardless of

---

<sup>205</sup> See *Wireless NPRM* ¶ 65.

<sup>206</sup> See 47 C.F.R. § 1.1306 note 1.

<sup>207</sup> See *id.* § 1.1306(c). Construction of a wireless facility in a ROW, including deployment on a new or replacement pole, is excluded from NEPA (but not NHPA) review if the facility (i) is no more than 10% or 20 feet taller or 20 feet wider than existing support structures in the ROW; (ii) will not involve the installation of more than four new equipment cabinets/one new equipment shelter, and will not involve excavation outside the current site; and (iii) will not exceed FCC RF exposure limits. *Id.* Applicants must still consider historic effects, unless separately excluded from NHPA review.

whether they are located in a communications or utility ROW, if: (i) the new or replacement pole is no more than 10% or 20 feet taller or 20 feet wider than other existing nearby support structures, will not involve the installation of more than four new equipment cabinets/one new equipment shelter, and will not involve excavation outside the property surrounding the deployment; and (ii) will not exceed FCC RF exposure limits.<sup>208</sup>

### **3. Shot Clocks Should Be Adopted to Expedite Environmental Reviews and Resolve Environmental Disputes.**

The Commission also should establish shot clocks to process EAs and to resolve environmental delays and disputes.<sup>209</sup> The environmental review process is a significant source of delay for wireless infrastructure deployment, unbounded by any timelines to speed resolution and draw proceedings to a timely close. In some cases, EAs filed with the Commission remain pending for years.<sup>210</sup> Adoption of shot clocks for EAs will eliminate unnecessary delays and provide concrete timelines for the resolution of disputes.

#### **B. The Commission Should Further Streamline the NHPA Review Process.**

The Commission should, *inter alia*, expand its existing NHPA Section 106 exclusions for pole replacements, facilities located in ROWs, collocations, small indoor installations, small wireless installations on light and traffic structures, and industrial park deployments.<sup>211</sup> Although the Commission has taken steps to expand the scope of its NHPA exclusions in recent years, the existing exclusions do not cover all deployments that will be necessary to facilitate 5G

---

<sup>208</sup> Consideration of historic effects would still be required, unless separately excluded. *See infra* Section IV.B.

<sup>209</sup> *See* T-Mobile Comments at 39.

<sup>210</sup> T-Mobile Comments at 39 (citing *SBA Towers III, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 1755 (WTB 2016)).

<sup>211</sup> *See Wireless NPRM* ¶¶ 66-75.

deployments. Moreover, these efforts have created a complex and confusing set of exclusions that can at times deter their use, defeating the goals of the exclusions.

**1. The Commission Should Exclude Pole Replacements From Section 106 Review**

The Commission should expand the existing tower replacement exclusion in Section III.B of the 2004 Nationwide Programmatic Agreement (“2004 NPA”)<sup>212</sup> to include not only towers but also replacement poles as long as they are not substantially larger than the existing poles. This expansion is necessary to expedite deployment of the large number of small cells necessary for 5G services and can be implemented with “no or . . . minimal potential for adverse impact[]” to historic properties.<sup>213</sup>

Currently, the pole replacements are exempted from Section 106 review under this exclusion only if the pole being replaced went through Section 106 review and meets the definition of a “tower” under the, i.e., if it was “built for the sole or primary purpose” of supporting FCC licensed antennas.<sup>214</sup> The large number of small cell deployments needed for the rollout of 5G services will require the use of poles that were not constructed for the primary purpose of supporting antennas, and thus are not “towers” eligible for the existing exclusion. The original purpose of a pole, however, is not dispositive of potential adverse impacts on historic properties. The replacement of an existing “non-tower” pole with a “tower” pole should have no

---

<sup>212</sup> Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, codified as 47 C.F.R. Part 1, App. C (hereinafter cited as “2004 NPA”).

<sup>213</sup> See *Wireless NPRM* ¶¶ 67-68.

<sup>214</sup> 2004 NPA, §§ II.A.14, III.B. The replacement also must not result expand the boundaries of the owned or leased property surrounding the tower by more than 30 feet, or result in excavation outside those expanded boundaries or any existing access or utility easement surrounding the structure. *Id.* § III.B.

adverse impact on historic properties, provided the new pole is not “substantially” larger.<sup>215</sup>

Accordingly, the Commission should expand the existing exclusion to exempt from Section 106 review all replacement poles that are not substantially larger than an existing pole.<sup>216</sup>

## **2. The Commission Should Expand the Existing ROW Exclusion**

The Commission should expand the existing ROW exclusion in Section III.E of the 2004 NPA—currently limited to utility and communications ROWs—to apply to all ROWs, including transportation ROWs, and to limit the need for Tribal review.<sup>217</sup> Currently, construction of a facility in or within fifty feet of an active-use utility or communications ROW is excluded, provided the facility (i) is not substantially larger than other nearby existing structures within the ROW; (ii) is not located within the boundaries of a historic property; and (iii) completes the Tribal review process.<sup>218</sup>

As the Commission correctly recognizes, the wireless industry has changed substantially since the original ROW exclusion was adopted.<sup>219</sup> Consumer demand for 5G services is requiring carriers and infrastructure providers to rely more heavily on small cells, which in turn requires a greater reliance on ROWs for the deployment of these facilities. In particular, “transportation corridors are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest.”<sup>220</sup>

---

<sup>215</sup> Substantial increase in size is defined in elements 1-3 of Section I.E of the Collocation Agreement. *See id.* § III.B; Collocation Agreement, § I.E.

<sup>216</sup> *See Wireless NPRM* ¶ 67.

<sup>217</sup> *See id.* ¶ 69.

<sup>218</sup> *See* 2004 NPA, § III.E. As with the replacement tower exclusion, substantial increase in size is defined in elements 1-3 of Section I.E of the Collocation Agreement. *See id.*, § III.E; Collocation Agreement, § I.E

<sup>219</sup> *See Wireless NPRM* ¶ 70.

<sup>220</sup> *See id.* ¶ 69 (citation omitted).



In expanding the ROW exclusion, the Commission should retain the existing size limitation, which only excludes facilities that are not substantially larger than existing facilities located in the ROW in the vicinity of the proposed new facility.<sup>221</sup> This limitation will prevent any significant adverse impact on historic resources associated with the deployment of wireless facilities in ROWs.<sup>222</sup> In addition, the Commission should eliminate the need for Tribal review for facilities located in any ROW if (i) there is no new ground disturbance;<sup>223</sup> and (ii) the facility would not be located on properties or districts identified in the National Register listing or determination of eligibility as having Tribal significance.<sup>224</sup> These two limitations should prevent any significant adverse impact on historic Tribal resources.

### **3. The Commission Should Streamline the Section 106 Review Process for Wireless Collocations**

The Commission should further expedite wireless infrastructure deployment by streamlining the Section 106 review process for collocations. Specifically, as described more fully below, the Commission should (i) exclude from the Section 106 review process collocations that have received local approval,<sup>225</sup> (ii) eliminate the 250-foot historic district buffer zone applicable to several existing exclusions,<sup>226</sup> and (iii) eliminate the need for Tribal

---

<sup>221</sup> 2004 NPA, § III.E.1.

<sup>222</sup> *See Wireless NPRM* ¶ 71.

<sup>223</sup> *See, e.g.,* Collocation Agreement, § VI.A.5 (limiting application of small antenna exclusion to instances where the “depth and width of any proposed . . . collocation does not exceed the depth and width of any previous ground disturbance (including footings and other anchoring mechanisms),” with an exception for up to four lightning rods).

<sup>224</sup> *See Wireless NPRM* ¶¶ 71, 74.

<sup>225</sup> *See id.* ¶ 75.

<sup>226</sup> *Id.* ¶ 73.

consultation where there is no new ground disturbance and the collocation is not on Tribal land or a property or district identified in the National Register as having Tribal significance.<sup>227</sup>

First, collocations that have received local approval should be excluded from Section 106 review, provided “(1) the proposed collocation has been reviewed and approved by a Certified Local Government that has jurisdiction over the project; or (2) the collocation has received approval, in the form of a Certificate of Appropriateness or other similar formal approval, from a local historic preservation review body that has reviewed the project pursuant to the standards set forth in a local preservation ordinance and has found that the proposed work is appropriate for the historic structure or district.”<sup>228</sup> This approach would not increase the potential for adverse historic impacts, but rather would avoid the need for duplicative preservation reviews when local officials have already reviewed the proposal. As the Commission recognizes, excluding collocations under these circumstances would “create significant efficiencies in the historic preservation review process.”<sup>229</sup> This exclusion should apply regardless of whether the collocation will be located in/on a historic property/district, because the local reviews just described will have taken such factors into account.

Second, the Commission should eliminate the need for collocations to be subject to Section 106 review merely because they would be located “within 250 feet of the boundary of a historic district.”<sup>230</sup> Currently, two sections of the Collocation Agreement include this buffer zone,<sup>231</sup> but Section 106 review should only be required for collocations within a historic district.

---

<sup>227</sup> *See id.* ¶ 73.

<sup>228</sup> *See id.* ¶ 75 (citations omitted).

<sup>229</sup> *See Wireless NPRM* ¶ 75.

<sup>230</sup> Collocation Agreement, §§ V.A.2, VI.A.1.

<sup>231</sup> *See id.*

There is no reason to create a buffer zone outside of historic districts, whether it is the current 250-foot buffer or a 50-foot buffer as contemplated by the Commission.<sup>232</sup> In fact, no rationale for the existing 250-foot buffer zone has been provided.<sup>233</sup>

Finally, the Commission should eliminate the need for Tribal review for collocations where there is no new ground disturbance and the collocation is not on Tribal land or a property or district identified in the National Register as having Tribal significance.<sup>234</sup> There should be no need for Tribal review where these criteria are satisfied.

#### **4. The Commission Should Streamline the Section 106 Review Process for Indoor Small Wireless Deployments.**

The Commission should take additional steps to eliminate unnecessary burdens associated with small wireless facility deployments by streamlining the Section 106 review process associated with indoor deployments. Although the Collocation Agreement was recently amended to eliminate many small indoor wireless deployments from the Section 106 review process,<sup>235</sup> additional improvements should be made to significantly expedite indoor wireless deployments without jeopardizing historic resources.

First, the Commission clarify that, for small wireless indoor deployments, the volumetric limits set forth in the Sections VI and VII.A of the Collocation Agreement do not include equipment located entirely within the interior of a building. These volumetric limits were

---

<sup>232</sup> *Wireless NPRM* ¶ 73.

<sup>233</sup> *See Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004); *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016).

<sup>234</sup> *See Wireless NPRM* ¶ 73.

<sup>235</sup> *See Collocation Agreement*, §§ VI, VII.A.

adopted to address visual impacts. Accordingly, only external (outdoor) components associated with indoor small wireless deployments should be included within the volumetric calculation.

Second, the Commission should eliminate the need for Tribal review of indoor small wireless facility deployments that will be installed in structures that are not identified in the National Register as having Tribal significance. Some WIA members have reported significant delays associated with the Tribal review process associated with these deployments, even though the antennas are not visible outside and the building itself does not have Tribal significance. In one instance, installation of small wireless antenna inside a museum in a major metropolitan area triggered almost \$8,000 in Tribal fees just because the building is historic (but not of Tribal significance). Because these deployments are within non-Tribal historic structures and not visible from Tribal lands or outside of the structure, the Commission should determine that they create no adverse impact on Tribal resources and therefore do not trigger the Tribal review process.

#### **5. The Commission Should Simplify Its Exclusion for Small Facilities on Light and Traffic Structures.**

The Commission should eliminate the need for case-by-case SHPO review in order to avoid Section 106 review for the installation of small antennas on light and traffic structures. Currently, Section VII.C of the Collocation Agreement excludes small wireless deployments on traffic control and lighting structures located in or near historic districts if the deployment meets certain size and ground disturbance limitations, but only if: (i) the applicant requests in writing that the SHPO concur with the applicant's determination that the structure is not a contributing element; and (ii) the SHPO agree or does not object within 30 days of receipt of the written request.<sup>236</sup> This case-by-case SHPO clearance process is an unnecessary drain on SHPO and applicant resources that will deter use of the exclusion for deployments on these 5G-critical

---

<sup>236</sup> *Id.* § VII.C (OMB approval pending).

resources. The Commission should simplify the process by eliminating the need for individual SHPO approval. Instead, the exclusion should apply if applicants use a qualified historic preservation consultant to confirm that the structure is not a contributing element.<sup>237</sup>

**6. The Commission Should Modify the Industrial Park/Shopping Center Exclusion to Narrow Tribal Review.**

The Commission should amend Section III.D of the 2004 NPA to narrow the need for Tribal review. Section III.D excludes from Section 106 review a proposed wireless facility if it would be “less than 200 feet in overall height above ground level in an existing industrial park, commercial strip mall, or shopping center that occupies a total land area of 100,000 square feet or more, provided that the industrial park, strip mall, or shopping center is not located within the boundaries of or within 500 feet of a Historic Property, as identified by the Applicant after a preliminary search of relevant records.”<sup>238</sup> Given the previously disturbed and industrial nature of these locations, the Commission should eliminate the need for Tribal review where there is no new ground disturbance and the collocation is not on Tribal land or a property or district identified in the National Register as having Tribal significance. There should be no need for Tribal review where these criteria are satisfied.

**7. The Commission Should Extend the Compound Expansion Component of the 2004 NPA to the Collocation Agreement.**

The Commission also should conform the excavation component of the “substantial increase in size” definition in Section I.E of the Collocation Agreement with the compound expansion component of the replacement tower exclusion in Section III.B of the 2004 NPA.

---

<sup>237</sup> Consistent with Section VI.D of the 2004 NPA, a qualified historic preservation consultant should be defined as “a professional who meets the Secretary of the Interior’s Professional Qualification Standards.” *See* 2004 NPA, §§ VI.D.1.d-e, VI.D.2.b.

<sup>238</sup> *Id.*, § III.D.

Pursuant to the replacement tower exclusion, excavation is permitted up to thirty feet outside of an existing tower site without triggering the need for Section 106 review. In contrast, the “substantial increase in size” definition is triggered for collocations on towers that require excavation anywhere outside of the tower site. There is no justification for this difference. The excavation associated with a collocation is less intrusive than that required for a replacement tower. Thus, if a replacement tower can be constructed without triggering Section 106 even though excavation is required up to thirty feet outside of the original site, collocations should be treated similarly.

## **V. THE COMMISSION SHOULD ADDRESS IMPEDIMENTS CREATED BY POLE ATTACHMENT PROBLEMS.**

The Commission should adopt a pole attachment shot clock requiring the Enforcement Bureau to act on pole attachment complaints within 180 days or less.<sup>239</sup> Congress imposed a 180-day shot clock on States to resolve pole attachment complaints.<sup>240</sup> The Commission should not take longer to resolve such complaints. Moreover, establishment of an FCC shot clock for pole attachment complaints will expedite wireless facility deployment by ensuring timely resolution of complaints.

The pole attachment complaint shot clock should commence upon the filing of a complaint,<sup>241</sup> and should not be tolled absent the consent of the complaining party.<sup>242</sup> Any rule permitting tolling where additional information is needed from a party will promote

---

<sup>239</sup> See *Wireline NPRM* ¶¶ 47-51. This approach mirrors the one suggested by Verizon in response to the *2016 Streamlining Public Notice*, which WIA supported. See Verizon Comments at 31-33.

<sup>240</sup> 47 U.S.C. § 224(c)(3)(B)(i).

<sup>241</sup> See *Wireline NPRM* ¶ 48.

<sup>242</sup> See *id.* ¶ 49.

gamesmanship with defendants routinely providing insufficient answers and information to postpone resolution of a complaint.

The Commission should also use its leadership to promote action by states that regulate pole attachments. Indeed, conflicts between providers and local governments frequently stem from restrictions imposed by utility pole owners. Providers are prevented from using existing poles by pole owner policies, which leaves local governments confused and frustrated by the alternatives that WIA's members are forced to propose in the alternative.

Finally, WIA agrees with Verizon that the Commission should clarify that utility-owned light poles fall within the definition of "pole" as that term is used in Section 224 of the Act.<sup>243</sup> Because Section 224(f)(1) requires investor-owned utilities to provide "telecommunications carrier[s] with nondiscriminatory access to *any pole*," the Commission should clarify that this language includes light poles. The Commission also should establish a rate formula for attachments to light poles.

## **VI. THE COMMISSION SHOULD CONTINUE TO SUPPORT EFFORTS TO STREAMLINE WIRELESS FACILITY SITING ON FEDERAL LANDS.**

The Commission should continue to support efforts to facilitate siting on federal lands.<sup>244</sup> In 2015, the Broadband Opportunity Council ("Council") released a report recommending that

---

<sup>243</sup> Verizon Comments at 31-33; *see* 47 U.S.C. § 224.

<sup>244</sup> *See* Pai Digital Empowerment Remarks at 2-3 ("Federal agencies should survey and consolidate the information they have about federal assets that could be used to aid broadband deployment. Maps of these federal assets should be made available to ISPs in a manner that respects security and law enforcement considerations. The federal agencies most often involved in broadband buildout . . . should adopt reasonable internal shot clocks for processing applications and negotiating leases to build on federal lands. At a minimum, they should establish a firm deadline so that no matter how many federal agencies need to review an application, an applicant will receive a final answer within one year. Federal agencies should minimize and standardize any fees for permits and for leasing rights of way. And federal

federal agencies further streamline access to federal lands, structures, and rights of way to speed broadband deployment nationwide. The Council also recommended creation of an accessible and open inventory of, as well as expanded access to, federal assets that can support broadband.<sup>245</sup> Given the importance of federal lands to wireless broadband deployment, the Commission should evaluate how it can facilitate implementation of these recommendations.<sup>246</sup>

WIA applauds efforts taken to date by stakeholders to streamline the wireless infrastructure siting process for federal lands. For example, last month the Advisory Council on Historic Preservation issued a Program Comment for Communications Projects on Federal Lands and Property.<sup>247</sup> The Program Comment was developed at the request of the U.S. Department of Homeland Security to accelerate the review of communications projects, particularly broadband deployment, under Section 106 of the NHPA. And last year, Department of the Navy released new guidelines—through a memorandum titled “Streamlined Process for Commercial Broadband Deployment”—designed to improve the speed at which wireless infrastructure facilities are deployed on properties owned by the U.S. Government and operated by the U.S. Navy or U.S. Marine Corps.<sup>248</sup>

---

agencies should issue longer-term leases or easements with renewal expectancies, so that providers have the certainty necessary to deploy on federal lands.”).

<sup>245</sup> USDA & Dept. of Commerce, Broadband Opportunity Council Report and Recommendations, at 23 (Aug. 20, 2015).

<sup>246</sup> *Id.* at 10.

<sup>247</sup> Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property, 82 Fed. Reg. 23818 (May 24, 2017).

<sup>248</sup> Memorandum from Thomas W. Hicks, Deputy Undersecretary of the Navy, Regarding the Streamlined Process for Commercial Broadband Deployment (June 30, 2016), <http://www.doncio.navy.mil/uploads/0711VXG97966.pdf>.



WIA encourages the Commission to support additional actions by policymakers to achieve streamlined access to federal lands for wireless infrastructure siting, and looks forward to providing continuing support in furtherance of these important efforts.

### **CONCLUSION**

The deployment of wireless networks and services is a critical element of America's present and future economy. By acting now to take the steps recommended herein, the Commission can take meaningful steps to remove barriers to wireless infrastructure deployment and ensure that American consumers can reap the benefits of 5G and future wireless technologies.

Respectfully submitted,

/s/ \_\_\_\_\_  
D. Zachary Champ  
Director, Government Affairs

D. Van Fleet Bloys  
Senior Government Affairs Counsel

Sade Oshinubi  
Government Affairs Counsel

**Wireless Infrastructure Association**  
500 Montgomery Street, Suite 500  
Alexandria, VA 22314  
(703) 739-0300

June 15, 2017